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IN THE NINETEENTH CENTURY

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ASSOCIATION OF AMERICAN LAW SCHOOLS

THE
PROGRESS OF CONTINENTAL LAW
IN THE
NINETEENTH CENTURY

BY
VARIOUS AUTHORS

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LIST OF COLLABORATORS

PREFACE AND INTRODUCTIONS

JOHN HENRY WIGMORE . . .	Chicago, Illinois
EDWIN M. BORCHARD . . .	New Haven, Connecticut
SIR FREDERICK POLLOCK, Bart. . .	London, England

TEXT

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OTTFRIED NIPPOLD . . .	Bern, Switzerland
JOHN HENRY WIGMORE . . .	Chicago, Illinois

TRANSLATORS

LAYTON BARTOL REGISTER . . .	Philadelphia, Pennsylvania
ERNEST BRUNCKEN . . .	Washington, District of Columbia

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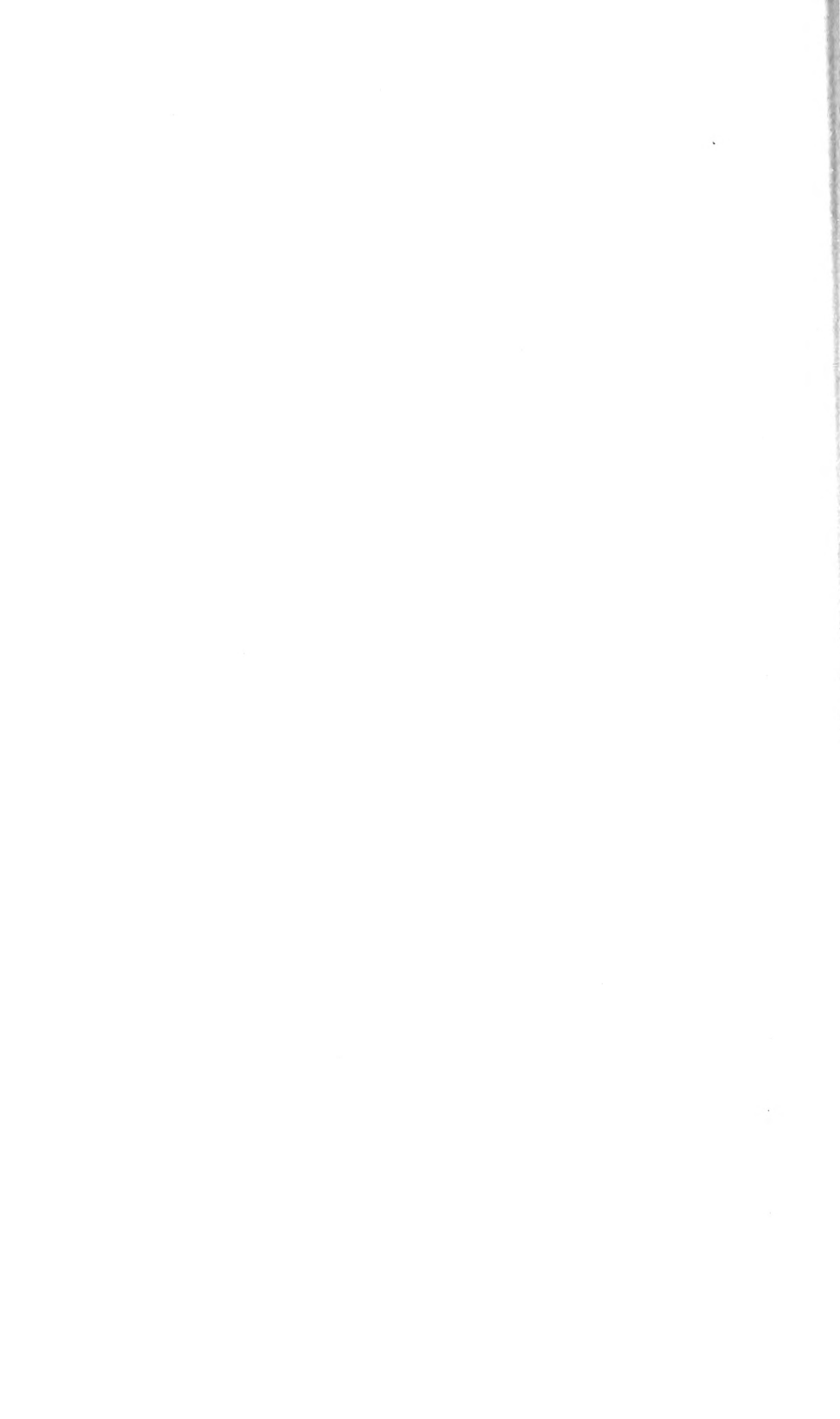


I might instance in other professions the obligation men lie under of applying themselves to certain parts of History; and I can hardly forbear doing it in that of the Law, — in its nature the noblest and most beneficial to mankind, in its abuse and debasement the most sordid and the most pernicious. A lawyer now is nothing more (I speak of ninety-nine in a hundred at least), to use some of Tully's words, "nisi leguleius quidem cautus, et acutus praeco actionum, cantor formularum, aueps syllabarum." But there have been lawyers that were orators, philosophers, historians: there have been Bacons and Clarendons. There will be none such any more, till in some better age true ambition, or the love of fame, prevails over avarice; and till men find leisure and encouragement to prepare themselves for the exercise of this profession, by climbing up to the vantage ground (so my Lord Bacon calls it) of Science, instead of grovelling all their lives below, in a mean but gainful application of all the little arts of chicanery. Till this happen, the profession of the law will scarce deserve to be ranked among the learned professions. And whenever it happens, one of the vantage grounds to which men must climb, is Metaphysical, and the other, Historical Knowledge. HENRY ST. JOHN, Viscount BOLINGBROKE, *Letters on the Study of History* (1739).

Whoever brings a fruitful idea to any branch of knowledge, or rends the veil that seems to sever one portion from another, his name is written in the Book among the builders of the Temple. For an English lawyer it is hardly too much to say that the methods which Oxford invited Sir Henry Maine to demonstrate, in this chair of Historical and Comparative Jurisprudence, have revolutionised our legal history and largely transformed our current text-books. — Sir FREDERICK POLLOCK, Bart., *The History of Comparative Jurisprudence* (Farewell Lecture at the University of Oxford, 1903).

No piece of History is true when set apart to itself, divorced and isolated. It is part of an intricately pieced whole, and must needs be put in its place in the netted scheme of events, to receive its true color and estimation. We are all partners in a common undertaking, — the illumination of the thoughts and actions of men as associated in society, the life of the human spirit in this familiar theatre of coöperative effort in which we play, so changed from age to age, and yet so much the same throughout the hurrying centuries. The day for synthesis has come. No one of us can safely go forward without it. — WOODROW WILSON, *The Variety and Unity of History* (Address at the World's Congress of Arts and Science, St. Louis, 1904).

A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect. — Sir WALTER SCOTT, "*Guy Mannering*," c. XXXVII.



CONTINENTAL LEGAL HISTORY SERIES

GENERAL INTRODUCTION TO THE SERIES

"ALL history," said the lamented master Maitland, in a memorable epigram, "is but a seamless web; and he who endeavors to tell but a piece of it must feel that his first sentence tears the fabric."

This seamless web of our own legal history unites us inseparably to the history of Western and Southern Europe. Our main interest must naturally center on deciphering the pattern which lies directly before us, — that of the Anglo-American law. But in tracing the warp and woof of its structure we are brought inevitably into a larger field of vision. The story of Western Continental Law is made up, in the last analysis, of two great movements, racial and intellectual. One is the Germanic migrations, planting a solid growth of Germanic custom everywhere, from Danzig to Sicily, from London to Vienna. The other is the posthumous power of Roman law, forever resisting, struggling, and coalescing with the other. A thousand detailed combinations, of varied types, are developed, and a dozen distinct systems now survive in independence. But the result is that no one of them can be fully understood without surveying and tracing the whole.

Even insular England cannot escape from the web. For, in the first place, all its racial threads — Saxons, Danes, Normans — were but extensions of the same Germanic warp and woof that was making the law in France, Germany, Scandinavia, Netherlands, Austria, Switzerland, Northern Italy, and Spain. And, in the next place, its legal culture was never without some of the same intellectual influence of Roman law which was so thoroughly overspreading the Continental peoples. There is thus, on the one hand, scarcely a doctrine or rule in our own system which cannot be definitely and profitably traced back, in comparison, till we come to the point of divergence, where we once shared it in common with them. And, on the other hand, there is, during all the intervening centuries, a more or less constant juristic sociability (if it may be so called) between Anglo-American and Con-

tinental Law; and its reciprocal influences make the story one and inseparable. In short, there is a tangled common ancestry, racial or intellectual, for the law of all Western Europe and ourselves.

For the sake of legal science, this story should now become a familiar one to all who are studious to know the history of our own law. The time is ripe. During the last thirty years European scholars have placed the history of their law on the footing of modern critical and philosophical research. And to-day, among ourselves, we find a marked widening of view and a vigorous interest in the comparison of other peoples' legal institutions. To the satisfying of that interest in the present field, the only obstacle is the lack of adequate materials in the English language.

That the spirit of the times encourages and demands the study of Continental Legal History and all useful aids to it was pointed out in a memorial presented at the annual meeting of the Association of American Law Schools in August, 1909:

"The recent spread of interest in Comparative Law in general is notable. The Comparative Law Bureau of the American Bar Association; the Pan-American Scientific Congress; the American Institute of Criminal Law and Criminology; the Civic Federation Conference on Uniform Legislation; the International Congress of History; the libraries' accessions in foreign law, — the work of these and other movements touches at various points the bodies of Continental law. Such activities serve to remind us constantly that we have in English no histories of Continental law. To pay any attention at all to Continental law means that its history must be more or less considered. Each of these countries has its own legal system and its own legal history. Yet the law of the Continent was never so foreign to English as the English law was foreign to Continental jurisprudence. It is merely maintaining the best traditions of our own legal literature if we plead for a continued study of Continental legal history.

"We believe that a better acquaintance with the results of modern scholarship in that field will bring out new points of contact and throw new light upon the development of our own law. Moreover, the present-day movements for codification, and for the reconstruction of many departments of the law, make it highly desirable that our profession should be well informed as to the history of the nineteenth century on the Continent in its great measures of law reform and codification.

"For these reasons we believe that the thoughtful American lawyers and students should have at their disposal translations of some of the best works in Continental legal history."

And the following resolution was then adopted unanimously by the Association:

"That a committee of five be appointed, on Translations of Continental Legal History, with authority to arrange for the translation and publication of suitable works."

The Editorial Committee, then appointed, spent two years in studying the field, making selections, and arranging for translations. It resolved to treat the undertaking as a whole; and to co-ordinate the series as to (1) periods, (2) countries, and (3) topics, so as to give the most adequate survey within the space-limits available.

(1) As to *periods*, the Committee resolved to include modern times, as well as early and mediæval periods; for in usefulness and importance they were not less imperative in their claim upon our attention. Each volume, then, was not to be merely a valuable torso, lacking important epochs of development; but was to exhibit the history from early to modern times.

(2) As to *countries*, the Committee fixed upon France, Germany, and Italy as the central fields, leaving the history in other countries to be touched so far as might be incidentally possible. Spain would have been included as a fourth; but no suitable book was in existence; the unanimous opinion of competent scholars is that a suitable history of Spanish law has not yet been written.

(3) As to *topics*, the Committee accepted the usual Continental divisions of Civil (or Private), Commercial, Criminal, Procedural, and Public Law, and endeavored to include all five. But to represent these five fields under each principal country would not only exceed the inevitable space-limits, but would also duplicate much common ground. Hence, the grouping of the individual volumes was arranged partly by topics and partly by countries, as follows:

Commercial Law, Criminal Law, Civil Procedure, and Criminal Procedure, were allotted each a volume; in this volume the basis was to be the general European history of early and mediæval times, with special reference to one chief country (France or Germany) for the later periods, and with an excursus on another chief country. Then the Civil (or Private) Law of France and of Germany was given a volume each. To Italy was then given a volume covering all five parts of the field. For Public Law (the subject least related in history to our own), a volume was given to France, where the common starting point with England, and the later divergences, have unusual importance for the history of our courts and legal methods. Finally, two volumes were allotted to general surveys indispensable for viewing the connec-

tion of parts. Of these, an introductory volume deals with Sources, Literature, and General Movements, — in short, the external history of the law, as the Continentals call it (corresponding to the aspects covered by Book I of Sir F. Pollock and Professor F. W. Maitland's "History of the English Law before Edward I"); and a final volume analyzes the specific features, in the evolution of doctrine, common to all the modern systems.

Needless to say, a Series thus co-ordinated, and precisely suited for our own needs, was not easy to construct out of materials written by Continental scholars for Continental needs. The Committee hopes that due allowance will be made for the difficulties here encountered. But it is convinced that the ideal of a co-ordinated Series, which should collate and fairly cover the various fields as a connected whole, is a correct one; and the endeavor to achieve it will sufficiently explain the choice of the particular materials that have been used.

It remains to acknowledge the Committee's indebtedness to all those who have made this Series possible.

To numerous scholarly advisers in many European universities the Committee is indebted for valuable suggestions towards choice of the works to be translated. Fortified by this advice, the Committee is confident that the authors of these volumes represent the highest scholarship, the latest research, and the widest reputation, among European legal historians. And here the Committee desires also to express its indebtedness to Elbert H. Gary, Esq., of New York City, for his ample provision of materials for legal science in the Gary Library of Continental Law (in Northwestern University). In the researches of preparation for this Series, those materials were found indispensable.

To the authors the Committee is grateful for their willing co-operation in allowing this use of their works. Without exception, their consent has been cheerfully accorded in the interest of legal science.

To the publishers the Committee expresses its appreciation for the cordial interest shown in a class of literature so important to the higher interests of the profession.

To the translators, the Committee acknowledges a particular gratitude. The accomplishments, legal and linguistic, needed for a task of this sort are indeed exacting; and suitable translators are here no less needful and no more numerous than suitable authors. The Committee, on behalf of our profession, acknowl-

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edges to them a special debt for their cordial services on behalf of legal science, and commends them to the readers of these volumes with the reminder that without their labors this Series would have been a fruitless dream.

So the Committee, satisfied with the privilege of having introduced these authors and their translators to the public, retires from the scene, bespeaking for the Series the interest of lawyers and historians alike.

THE EDITORIAL COMMITTEE.

THE
PROGRESS OF CONTINENTAL LAW
IN THE
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EDITORIAL PREFACE

BY JOHN H. WIGMORE ¹

To conclude this Series, which covers an historical span of fifteen centuries, it seemed natural, for the final volume, to shorten the focus of view and to enlarge the lens; in other words, to survey the final century preceding our own times with greater detail and on broad lines independent of particular countries. We should then be better enabled to detect the main trends of recent development as they approach and merge into the law of to-day, and to observe more closely the direct connection of the past with the present and the immediate future. A great light ought thus to be thrown on the meaning of the legal changes that may to-day be perceptible in process of being.

After the first two introductory volumes of general survey, the succeeding seven volumes dealt, some with general divisions of law in all the countries, and some with the law of a specific country. In each of these, the account was brought down into the nineteenth century. But that century was controlled by certain general influences affecting all countries and all branches of law in common. Hence a better view remains to be gained of the movements common to all, by surveying the century as a whole.

An examination of the literature, made without assumptions, seemed to reveal three such general movements.

¹ [Professor of law in Northwestern University, member of the Illinois Commission on Uniform State Legislation, chairman of the Committee on the Study of Legal History of the Association of American Law Schools.]

The first could be broadly described as the Movement for Adjustment of the Law to Changed Social and Political Conditions; this succeeded the political philosophy of the eighteenth century, the intellectual efforts of the "Enlightenment" period, and the social upheaval of the French Revolution.

The second was the Movement for the National Codification of Law; this in part was produced by the same influences, but had also different causes, some earlier, some later, and was in form independent of the other; moreover, its effects were distinct; and, finally, it ended earlier in most countries, while the first movement is far from terminated anywhere.

The third movement, that of the Assimilation (or Unification) of the Private Law of the several nations, began only in the second half of the century, and is as yet just gathering force for its culmination; in a way, it is a reaction from the second movement, and it will probably last through the present century.

Though the scope of the present Series is the history of law on the Continent of Europe, yet the first and the third of these movements (the second only in slight degree) represent forces which also have affected Anglo-American law, — and for the reason that the intellectual, political, and commercial conditions giving rise to the movements were more or less shared by all Occidental nations. All the more important, therefore, is the legal history of that century to Anglo-American students. It can hardly be less than a revelation to some of us to find the nations of the Continent, separate from us so long in their legal annals and dominated by the science of Romanic law, nevertheless passing in their recent legal development through phases of thought sometimes identical with what we have believed to be peculiar in our own problems. Nothing could illustrate better the communalty of legal thinking which seems to be a feature of the approaching times and an accessory of the third great movement.

For Part I, covering the first of these movements, the introduction is furnished by ALVAREZ' brilliant chapter describing the transition of spirit from the eighteenth to the nineteenth century. Then follows DUGUI' s incomparable monograph, pointing out the significant details of the transformation in many fields; this monograph has marked its author as one of the most understanding interpreters among legal thinkers of to-day.¹ In the remaining

¹ His other work, "*Les transformations du droit public*", is of equal significance in political science, but falls without the purview of this Series.

fields, CHARMONT's lucid and cosmopolitan chapters form a fitting complement; the omitted chapters of Charmont's book cover substantially the same themes treated by Duguit. A valuable treatise by HEDEMANN, dealing with the same general field, sometimes in more detail and for a larger number of countries, could not be used, being as yet in embryo only.¹

It must be noted that the field of Commercial Law, in the stricter sense of Continental usage, seems not to have found anywhere yet a recorder of its progress. Search in every supposable quarter, in half-a-dozen languages, and inquiry of Continental scholars who ought to know, has revealed no chapter or volume doing for commercial law the service rendered by Duguit, Charmont, and Hedemann for civil law.

Part II opens with another chapter from ALVAREZ' useful book; and then PERICH's comprehensive survey shows us the principal features of national codification to the end of the century. Then follows GAUDEMET's sympathetic comparison of the Swiss and the French civil codes, the latest and the earliest products of the movement. VANNI's essay analyzes the Italian achievement of 1863; and Rocco's essay sketches the several stages of codification of commercial law.

For this movement, the useful literature is more scanty than might have been expected. The critiques prior to the present generation are obviously too near the unfinished total event to have value from our present point of view. Glasson's brief survey² is almost the only modern account, not here included, that offers more than a mere chronicle of the dates of the various codes.

¹ "Die Fortschritte des Zivilrechts im XIXten Jahrhundert", by *Justus Wilhelm Hedemann*, professor at Jena (Berlin, Carl Heymann); Part I appeared in 1910; the author informed us in 1913 that the remaining two Parts would not be complete before 1918 or 1919; but the Great War will doubtless prolong the delay.

A mine of information, for the local French movement in the first half of the century, is *Bonnet*, "La science du droit privé en France au début du XIXe siècle" (Paris, 1914).

A short account for Italy, partly supplementing Vanni's essay above, is *Rocco's* "La scienza del diritto privato in Italia nell' ultimi 50 anni" ("Rivista di diritto commerciale", 1911, Vol. IX).

A comprehensive and informing monograph, largely historical, which covers in part the same topics as Charmont's chapters is *Alvarez'* "De l'influence des phénomènes politiques, économiques, et sociaux dans l'organisation de la famille moderne" (Paris, 1889).

Thabaut's "L'évolution de la législation sur la famille, 1904-1913" (Paris, 1913), is a valuable study of tendencies in France, written from a Catholic point of view, but broad and rational in spirit.

² "La codification au XIXe siècle", by *E. Glasson*, late professor at the University of Paris" ("Revue politique et parlementaire", 1894, Part II).

In the various chapters of that treasure-house of constructive criticism "*Livre Centenaire du Code Civil*" (1904), much relevant information is scattered; but not in form available for concise borrowing.¹

Part III is opened by COHN's interesting account of the beginnings of the movement for the assimilation of law among the commercial nations. Looking back at the story from to-day's achievements, it partakes of that romance which success gives to the beginnings of all great enterprises; and, like the anti-slavery movement and others that have changed the world's history, it is seen to take origin in fruitless but necessary idealism and then to pass into an effective realism.

The unitary movement, and its peculiar phases, in maritime law is then portrayed in RIPERT's chapter, lucid and coherent in the best French manner. In this region of law, perhaps the most notable item of unity, the rules for navigation at sea (now adopted by some thirty countries), appear not yet to have found their historian; but possibly his account is concealed in some by-path of periodical literature, and the mention of the subject here may evoke a reference from one who knows.

The most fertile field for the assimilative and coöperative movement, that of administrative law framed by expert delegates and embodied in conventions, is treated in a chapter from REINSCH's comprehensive work.² The legal aspect of this subject is but one side of the enormous activity of the last fifty years in international congresses; and in Brussels, the home of international peaceful activities, there is even an International Bureau of International Congresses.³

The remaining principal field for harmonization of law, that of rules for solving conflict of laws, is represented by an essay of MEILI supplemented by an article of BALDWIN. The late Swiss jurist

¹ For the centenary of the Austrian Civil Code, a similar work was published, but its materials are chiefly of a significance too local for the present volume: "*Festschrift zur Jahrhundertfeier des Allgemeinen Bürgerlichen Gesetzbuches*" (2 vols., Vienna, 1911).

² The progress of this class of assimilated law is also shown in *Raymond L. Bridgman's* "*First Book of World Law: a Compilation of the International Conventions to which the Principal Nations are Signatory, with a Survey of their Significance*" (Boston, 1911). Mr. Bridgman's work includes the text of the conventions.

³ A list of the principal international congresses of the past century is given as an appendix to Judge Baldwin's article ("*Amer. J. of International Law*", 1907, Vol. I, Pt. 2, App., p. 808), "*The International Congresses and Conferences of the Last Century as Forces making towards the Solidarity of the World.*"

was one of the most fruitful and indefatigable workers in this subject; and Judge BALDWIN is its most distinguished representative in American thought and activity.¹

This Part, it was thought, could fittingly be closed by a glance in the direction of the future. The annals of the last half century record the vigorous growth of this tremendous movement — the greatest in scope and international potency since the French Revolution, and not matched by any other in the realm of law since the revival of Roman Law on the Continent eight centuries ago. And we are naturally curious to gauge its possibilities, by way of interpretation of its historical significance.

The attempts to forecast its trend have not been numerous.² Those here presented — from a Belgian, a Swiss, and an American — are chosen because they approach it from different points of view.

¹ An interesting and important aspect of this movement would have been, The Assimilating Influence of Roman Law upon the National Laws, — an influence that reached its end in the nineteenth century and left its final mark in the German Civil Code. A survey of the net results traceable in contemporary Continental legislation would exhibit the extent of the common stock of specific legal ideas due to this source. After considerable search the Committee became assured that no such treatise or essay had yet been published, and decided to invite its composition by a Continental scholar. For this purpose, after a survey of the possibilities, they secured the coöperation, late in 1913, of the eminent professor of comparative law at the University of Brussels, *René Marcq*. The essay was to be completed by the spring of 1915. But the Faithless Outrage of August 2, 1914, had its disastrous effects in this corner of science also. In spite of many efforts, no news of any kind has been obtained of the fate of the author.

The Editor here offers his homage to the name of one who would have been counted among our collaborators.

² The essay of *Ivan Perich* (author of Chapter VI in this volume), "De l'influence de l'unité de la législation sur la développement de la solidarité parmi les hommes" (published in "Compte rendu du 10^e Congrès de la fédération Européenne", Rome, Forzoni, 1909), is an idealistic advocacy of unification.

The essay of *Dove*, "Die Vereinfachung des internationalen Rechtsverkehrs" (in "Blätter für vergleichende Rechtswissenschaft und Volkswirtschaftslehre", 1911, Vol. VII, pp. 119, 149), is a summary survey of possibilities.

The essay of *Julius Ofner*, "Die Grundgedanke des Weltrechts" (Vienna, Hölder, 1889), is rather an enlightened study of common tendencies than of formal assimilation of the various systems of law.

It is regrettable that a chapter could not here have been included from the pen of the eminent Bonn professor, *Ernst Zitelmann*. His essay "Die Möglichkeit eines Weltrechts" was first printed some thirty years ago in the Vienna "Allgemeine Gerichtszeitung", and then reprinted at Vienna in 1888. But the reprint, at the time of our request in 1913, was exhausted and unprocurable. A new and enlarged edition was due to appear in 1914 (Duncker and Humblot, Leipzig and Berlin); but the outbreak of the war came too soon. Doubtless, if it ever appears, it will be a different book from the one that was composing in 1914.

EDITORIAL PREFACE

The gift of prophecy is not ours. But it is certain that war can only delay and not deflect nor annul the speedy progress of this normal growth in world-harmony. The chapter of History that must soonest be rewritten is the chapter on the Assimilation and Harmonization of World-Law.

INTRODUCTION

BY EDWIN M. BORCHARD ¹

THE publication of this work, the concluding volume of a notable series, marks an achievement in American legal literature. The editors of this series, men of broad vision who see in the evolution of law through the centuries something of the Ciceronean universality of law, have sought to bring within the horizon of the student of Anglo-American legal institutions a panorama of the unfolding of the law as a social phenomenon. In the process, some of the world's finest studies have been laid under contribution. In the present volume, attention is concentrated upon the developments of the nineteenth century, for the lawyer of today the most interesting and profitable of all.

The basis of modern life is economic. The revelations of science as applied to industry have worked a metamorphosis in economic conditions between the beginning and the end of the nineteenth century. These economic changes have brought in their train social changes, and these have been reflected in the law. The eighteenth century philosophy and the individualism of the French Revolution which found legal expression in the French civil code and in its widely diffused progeny in other countries began slowly to be replaced by the sociological philosophy of the later nineteenth century. Large scale industry, the rapid increase and accumulation of personal property, the growing complexity of business relationships arising out of corporate organization and combination, the concentration of population in urban communities and the ever greater facilities for communication, transportation, and international commerce and intercourse have brought about remarkable changes in social conditions, reflected in the law by transformations in private and public law. Early nineteenth century individualistic notions of liberty, liability, contract, and property have had to yield to new interpretations im-

¹ [Professor of Law in Yale University; formerly Law Librarian of Congress. — ED.]

pelled by the new conception of social solidarity. Former theories of liberty have been modified by a recognition of human life as a social asset and of the state's duty to protect it as such, and metaphysical conceptions have almost vanished before the more convincing teleological theory of law; liability has ceased to be altogether subjective and in industrial enterprise and public services has become objective, a process which has been carried furthest by the decisions of the French Council of State; a private contract is no longer a formalistic instrument, but embraces in its legal interpretation ever increasing elements of social purpose; and property is no longer an unlimited subjective right of the owner, but constitutes a public trust. In our own country we have recently witnessed this same evolution in the theories of liberty of contract, liability without fault, and assumption of risk.

With this change in legal interpretation of philosophical concepts has come an ever increasing expansion in the functions of the state, to prevent a violation of what may be called social justice and to protect the public interests. This activity is manifested by the increasing number of administrative commissions and bodies designed to insure the equitable operation of public legislation and in part to replace the ordinary judicial processes, with a coincidental modification of the ordinary rules of procedure and evidence. In our country, the line of demarcation between the police power and the constitutional limitations of the fifth and fourteenth amendments is being gradually moved in the direction dictated by the larger social interests of the state. Whether this represents, particularly in the field of labor legislation, a reaction against Sir Henry Maine's theory of evolution from status to contract or merely a recognition of the necessity for greater protection of the social interests of the state, it is beyond doubt that private property and private rights are now affected with a trust founded on social duties in the public interest.

These movements in continental Europe from the French civil code, with its inspiration in eighteenth century philosophy and individualistic legal theories, to the Swiss civil code of 1907, said to be the best expression in positive legislation of the socialization of civil law, with their cross-currents, their causes, purposes, influences, and achievements through the century have been ably traced in the two notable contributions of the Chilean jurist, Alvarez, and the French jurist, Duguit. The essay by Charmont, which follows, is an analytical study of the French law of domestic relations as affected by the economic and social changes of the

nineteenth century. Its criticisms of the modern corporation, its examination of labor legislation, and its critical study of the changes in the law of marriage, parental authority, and the protection of minors are of undoubted interest to the American student.

The transformation in law by legislation and interpretation in countries of a civilization and economic stage of development so closely approximating our own cannot fail to impress the American lawyer with the universality of law as a social instrument for the adjustment of conflicting interests.

Another phenomenon of the nineteenth century was the impetus given to codification. To the political upheaval incidental to the French Revolution and the eighteenth century philosophy which dominated it and to the ambition of Napoleon to unify municipal law in France the world owes, if not the first modern civil code, at least the most influential in the propagation of legal institutions and in its effect on legal history. Imposed by the French conqueror in some of the territories which fell under his dominion, the principal migrations of the code to foreign countries are attributable to the general admiration of the Latin world for French intellectual supremacy and culture and the desire to achieve order and unity in municipal law. The French civil code was perhaps the largest single factor in bringing about that approximation or internationalization of civil law witnessed today in such a considerable part of the world.

With its many advantages, however, it involved some disadvantages. Its introduction of the rationalistic method in legal science, its disdain of legal custom as a product of the unconscious evolution of a people, its failure to recognize the value of court decisions, and its invitation to jurists to rely solely on the exegetic method of legal interpretation, are faults from which continental legal science has suffered and from which it has only in part recovered. Practically all the other countries of Europe have enlisted in the movement for codification, all profiting by the work of France and by the criticisms revealed by experience and study there and abroad.

And here we find the beginning of the comparative method in legal science. Incidental to a selection of the best in the world's experience, a critical comparison in the light of current economic and social factors is an accepted method in the modern legal development of legislation. This method was utilized by the draftsmen of the principal codes following the French—the Italian in 1865, the German in 1896 and the Swiss in 1907. Each

of these, and above all the German code, has made its contribution to the evolution of law. In its combination of the historical and scientific method, to which German jurists have made the ablest contributions, the German code has exercised considerable influence in other countries, and, not least of all, among the modern jurists of France. Its systematic statement of a nation's law greatly influenced Eugen Huber, who also introduced numerous improvements upon it in the preparation of the Swiss code, notably in giving greater latitude to the judge and in a greater socialization of legal rules. This development of codification and its influence in continental Europe is traced in valuable essays by Alvarez, Perich, Gaudemet, and Vanni.

Commercial law, least tinged by national peculiarities, has offered less resistance to uniformity and assimilation than other branches of the law. In this important field, whose rules have migrated from country to country since their beginnings in Italy, France, about 1850, yielded its leadership of the early nineteenth century to Germany. The principles of the German Bills of Exchange Act have practically circled the globe and have received the endorsement of the Hague Bills of Exchange Conference. While the draft is not yet fully adopted, the insular unwillingness of English law to surrender its own peculiarities and the unfortunate constitutional position of the States of the United States have prevented the Anglo-American system, in this, as in so many other fields of legal science, from joining the rest of the world.

Perhaps the most striking legal phenomenon of the nineteenth century is the gradual assimilation of law throughout the world, an inevitable consequence of the growing contact between civilized nations. The constant growth in international intercourse, with the widening substitution of the doctrines of interdependence for independence, of internationalism for nationalism, has manifested the necessity, in the interests of convenience and order, for a joint regulation of mutual interests. This has taken place in various ways — by the adoption of uniform laws, as in the case of bills of exchange, by the observance of uniform customs, as in the York-Antwerp rules of general average, and, principally, by international agreements governing the many spheres of mutual interest which modern economic and social conditions have created. Public administrative unions in increasing numbers have been organized for the better regulation of those many economic relations which the extensive intercourse between nations has brought in its train. They include such matters

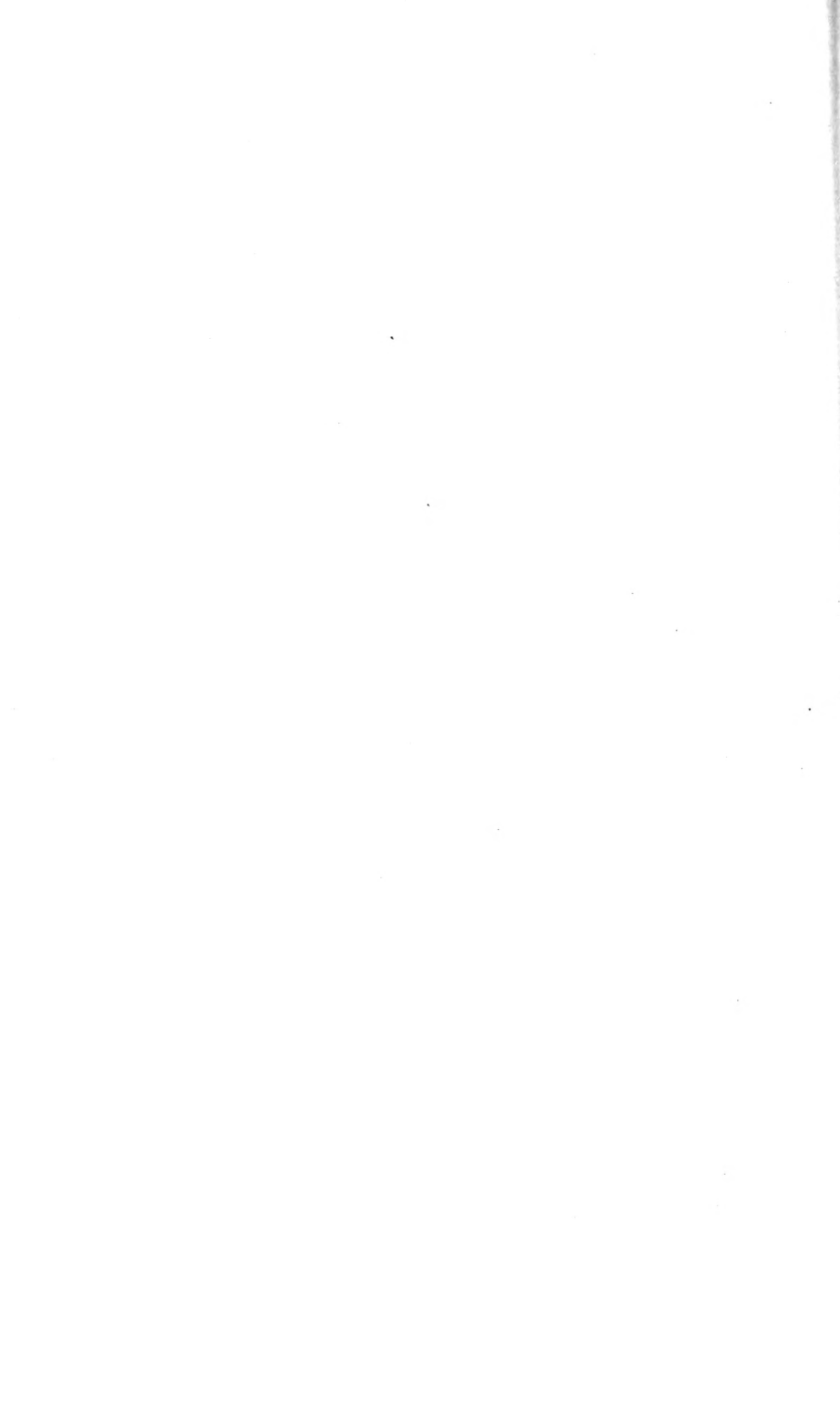
as the post, telegraph, railway transportation, navigation, patents, copyright and trademarks, and many other international phases of state activity described in the illuminating chapter by Reinsch.

Not the least important contribution to the movement for the assimilation of law has been the noteworthy achievement of the Hague conferences on private international law in providing rules for the adjustment of the conflict of laws in the litigation and adjudication of certain classes of cases. This movement, which has made an auspicious beginning, is traced in descriptive outline by the Swiss jurist, Meili, and in a more critical analysis by Simeon E. Baldwin, one of our foremost constructive jurists. There is no reason why all branches of the conflict of laws cannot be satisfactorily regulated, and Nippold's contribution consists in emphasizing the practical desirability and feasibility of assimilation in all matters falling within what he calls the international "law of intercourse."

To all students of law in its wider manifestations as a universal science, it is a matter of regret that the traditional insularity of the United States and its constitutional system have prevented it from contributing its fair share to the removal of obstacles from the facility and certainty of international relations in the field of private law. An analytical study of the methods of assimilation of law and a constructive criticism of our own share in the movement is the contribution of Wigmore, which fittingly terminates the volume.

The American lawyer, impressed with the necessity of finding remedies, by an improvement of our legal methods, for the inefficiency in our administration of justice and the resultant economic waste to the community, will find valuable food for thought and profit in the perusal of this volume and its predecessors. The slavish worship of a countless and often contradictory myriad of precedents, without regard to worth or source, and the judicially tolerated misuse of the doctrine of "stare decisis", have brought about a chaos and an uncertainty in our law which must give pause to the student who contemplates the future.¹ The compelling necessity for a more scientific system, and the elimination of the intolerable abuses which have often made our law such a poor servant of justice, make the publication of these volumes on the history and experience of more mature and scientific legal systems a striking service to the American bar.

¹ See article in 64 "Univ. of Penna. Law Review" (1916), 570.



INTRODUCTION

BY THE RIGHT HONORABLE SIR FREDERICK POLLOCK, BART.¹

THE fundamental differences between the methods of the Common Law and those of the European Continental jurisprudence are by this time well known to historical students. It is impossible, however, to appreciate any Continental treatment of legal doctrine on a broad scale, be it historical or dogmatic, without having those differences freshly present to one's mind. Some recapitulation, therefore, will not be irrelevant on the present occasion. We need for this purpose a comprehensive term to denote the great body of learning founded on the study and application of Roman Law in European communities from the twelfth century onwards: the various times and degrees of official reception will not concern us. The old-fashioned designation of Civil Law will serve us well enough if we remember that even in jurisdictions where the actual text of the *Corpus Juris* had the direct force of law subject to more or less of customary exception and addition, the contents of the Civil Law were no more confined to the letter of the Institutes, Digest and Code than the contents of the Common Law were at any time or now are confined to the letter of constitutional or statutory enactments.

The Common Law and the Civil Law are alike bodies of doctrine which is in the main unwritten in the technical sense of the term; that sense denies not expression in writing or even carefully studied expression, but only enactment by a positive authority. In each case the outcome, in matter and in form, is the fruit of a long and still continuing process of interpretation. But the methods of interpretation are diverse, and each system bears the stamp of its proper method. Common-law learning is forensic in its origin, civilian learning is scholastic. Not that English lawyers were untouched by speculation or Continental doctors divorced from practice; nevertheless the diversity is substantial and goes pretty deep. We proceed to trace its main lines.

¹ [LL. D.; Lincoln's Inn, London. — ED.]

INTRODUCTION

As early as the thirteenth century the Common Law of England was centralized in the King's Courts at Westminster. It was the King's law spoken by his judges, and there and from them only could it be learnt, for there was no other school or master. The service of the courts demanded skilled pleaders, and round the courts, in the course of two or three generations, a learned profession arose and established its tradition, a tradition whose bent was before all things practical and forensic, and its own hostels and schools. English universities were in their infancy when the Common Law was born, and had very little to do with its nurture; they were, like all medieval universities, cosmopolitan rather than national; the spiritual and intellectual centres they looked to were Rome, Bologna, Paris. Thus the law was made at Westminster by the judges, working on material prepared for them by their juniors and former companions of the Bar. The fact that in England we have never had any special branch of the profession told off for a judicial career cannot be dwelt on here, but is significant. Decision of judges answerable to the King and the lieges, founded on the discussion of the cause by advocates answerable to their clients and eager to win judicial approval—such appeared to our ancestors the soundest kind of building for a house of justice where the King's peace should be supreme and the rights of his subjects reasonably certain and assured.

A system so built up had, undoubtedly, one drawback. It was long before it could have a literature, and when books did come, as distinguished from mere collections of formulas and notes or reports of decisions,¹ they could take only a secondary place. This was settled as early as the first half of the thirteenth century. Henry of Bratton wrote the first systematic English law book, but his authentic material, as Vinogradoff and Maitland have taught us, was in the rolls of the King's Court. He went to the Institutes or rather Azo for a scientific framework, and for supplementary matter where English authority was then lacking; in case of conflict between Roman learning and English practice he never had a moment's doubt which should prevail. Bracton's Note Book, recovered from oblivion in our own time, is the herald of a continuous line, the line of recorded judicial precedents that have made our law. The treatise our fathers knew as Bracton had no independent successor till the eighteenth century.

¹ Down to the Restoration English lawyers, when they spoke of "our books" or "the books", meant the Year Books and such other reports as were current.

Thus the temper and opinions which prevailed from time to time in the social, political and economic life of the commonwealth were brought to bear upon the development of the law not by learned writings or codes, but through the judicial utterances of the Courts, consciously or unconsciously taking their point of view from their surroundings. Every one who is familiar with the reports of the first three quarters of the nineteenth century must have observed how the English judges were saturated with individualist economic doctrine, and have noted the effects of that frame of mind on our nineteenth century case-law, some of which appears to us at this day good, and some, to an increasing number of us, bad. Text-writers, as a rule, were content to set down the results without any discussion, or only with more or less discussion of a purely technical kind.

Bentham, we may note in passing, is not in the regular line of text-writers at all. He was a deliberate innovator, not an expounder; in the course of the following generation his revolutionary genius created a new atmosphere.¹

Again, the commanding and independent position of the King's judges enabled them to exercise great freedom not only in the development of purely unwritten doctrine but in the construction of parliamentary enactments, and this from the very first. Indeed the Justices of Edward I and Edward II achieved feats in this kind which none of their successors have dared to emulate. One may doubt whether they would have accepted the modern formula that the courts have no power to make law. As to this, there has been of late years a remarkable and seemingly quite independent movement among Continental jurists in the direction of the Common Law view. The Swiss Civil Code expressly directs the judge to exercise a quasi-legislative function in the absence of any applicable provision of enacted or customary law (p. 283, *post*). But it must be remembered that, according to the general Continental practice, a decision so made will be no more binding than any other decision upon other Courts of inferior or co-ordinate jurisdiction, or even in the same court in subsequent cases.

Our system has another point of singular historical felicity, so much a part of its intimate being that only long familiarity can

¹ The election of Bentham as a Bencher of Lincoln's Inn (1817, Black Books of Lincoln's Inn, iv. 147) should give pause to those who assume that the governing bodies of the Inns of Court are always ultra-conservative. One may doubt whether, at the time, a general vote of the Bar, or the members of the Inn, would have been so liberal.

bring full understanding of it. Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles recognized and applied as necessary grounds for the decision. Therefore it has never been possible for the courts to impose dogmatic formulas on the Common Law, and the efforts of text-writers to bind it in fetters of verbal definition have been constantly and for the most part happily frustrated by the reconsideration and restatement of guiding principles in the judgments of the highest tribunals. Again and again we have escaped, even by a hair's breadth, from being committed to obsolete or decaying speculative doctrine. A reader of nineteenth-century text-books might well think we had officially adopted the "fiction" theory of corporations (bound up, on the Continent, with the singular jealousy of corporations and private associations and foundations which the civilians took over from Roman imperial jurisprudence, and from which their successors are now emancipating themselves; but our text-writers understood nothing of this¹). Closer examination proves, and I venture to think the proof conclusive, that we are not bound to that or any other theory. The books tell us just as much as it is their office to tell us, namely, what are the statutory or common-law tests of capacity to sue and be sued in a corporate name, and in what ways the legal activities and responsibilities of a corporation may differ in kind and degree from those of a natural person. So, too, there have been currents of authority now setting towards individualism, now controlling it in the name of public policy, but the Common Law as a whole refuses to be fixed either way.

Let us now turn to the formation of Continental doctrine, and we shall find a wholly different set of conditions. The medieval revival of Roman law was not directed from any one centre. Jurisdiction and doctrine were alike dispersed in many courts and many universities, none of them exercising positive authority beyond its own bounds; and those bounds were provincial rather than national. It was therefore impossible that anything like a unitary source of authority should be acknowledged. The supremacy of the Holy Roman Empire was a thing of parchment and ink; it is enough to say that it was not admitted in France at any time after the tenth century. Thus the only practicable outcome was a ground work of doctrinal ideas, an inchoate philos-

¹ Down to a time well within my own memory the greater part of English lawyers were incapable of touching Roman law, ancient or modern, without some display of incompetence. Extraordinary blunders in the simplest citations occur in modern reports of quite good general repute.

ophy of law rather than a body of law, postulated with more or less efficacy as common to the various jurisdictions. One point we have to remember as of vital importance is that the universities were teaching the same kind of law that the courts administered, somewhat as American law schools at this day teach the Common Law, leaving the practitioner to work out the application as modified by the legislation and decisions of his particular State. This was quite contrary to the state of things in England, and the consequences were far-reaching.

At the same time there was one juridical system which at an early date attained a high degree both of refined learning and of centralized authority, that of the Canon Law. The relations of canonists and civilians were by no means uniformly harmonious, but even in controversy the more ancient and regular official doctrine of the Roman Curia could not fail to leave its mark. So far as Roman influence can be traced in English law, we have now learnt to seek its origin in canonical rather than secular jurisprudence. But it is not for us here, even if it were within the competence of an English lawyer, to appraise the part of the canonists in consolidating the great fabric of learning and speculation which furnished the materials not only for Continental codes but for the modern law of nations. Let us suffice to note that it was a very considerable part.

If the circumstances had otherwise been more favourable to the growth of any judicial authority claiming to stand even on an equal footing with academic learning, the tradition of classical Roman law would still have outweighed them. Under the republic, and for a long time under the empire, the judge was an unofficial layman, and as sharply distinguished from the learned advocate and counsellor as jurymen from judges in our own system. A function of scientific development analogous to that of our case-law was performed by the opinions of leading lawyers, embodied from time to time in the Praetor's edict. The business of learned men was not to analyze and systematize the decisions of courts, but to lay down the law which the courts had to apply.¹ It is true that the Emperor himself was, in the last resort, the supreme judge, and his decisions, given of course with the best learned

¹ We do not stop to mention the official authority of the *responsa prudentium*. That belongs to the technical history of the classical Roman law, and an account of it may be found in any good manual. It is remarkable that Gibbon, when he wrote his 44th chapter, was so thoroughly imbued with civilian ideas as to assume the insignificance of the judge without calling attention to it.

assistance, made law, but this was inevitable when the appellate judge was also the supreme legislator and expounder. Thus the revived study of Roman law in the Middle Ages was provided from the outset with a literary and scholastic tradition ready to be taken up by the universities and become academic. Only one partial analogy, so far as I know, may be found in English jurisprudence, and that in a very special branch of it; I mean the respect which our courts openly accord to the published opinions and current practice of learned conveyancers concerning questions in the law of real property. Yet those very writers, almost until our own time, offered lip-service to judicial authority in terms of all but slavish humbleness.

On the whole, then, the civilian order of thought with regard to the development of legal science is the reverse of ours. Learned opinion, a body of opinion in which professional and academic elements are intimately combined, leads the way. Practice and legislation give effect to conclusions derived from the received doctrine of learned authors, or in case of doubt those views are followed which appear to be the better supported. Judicial decision, as such, has no positive authority beyond its immediate effect. If and so far as judicial utterances are expressions of learned reason, they are esteemed according to the repute of their authors and not otherwise.

The foregoing general statement is intended to be, and I believe is, a tolerably correct account of a guiding habit of mind; it is not intended to be applicable in detail without caution. If anything is axiomatic in medieval history, it is that we find exceptions and anomalies at every turn as soon as we go below the surface. It would be as absurd to suppose that courts and judges count for nothing in Continental jurisprudence, at any stage, as to suppose that the private writings of learned persons count for nothing in the common law. Wherever the judicial office is in the hands of experts working on a regular method, and whatever the relations of those experts to the practising legal profession may be, the contribution of the courts to legal science must be material. This tendency becomes marked in proportion as legal and other public institutions acquire a really national character. In France, where the mixed political and judicial functions of the parliaments conferred a peculiar importance on the magistrature, it was very strong after the sixteenth century. Pothier, who holds the foremost place among the fathers of modern French law, and much of whose work is literally

or all but literally embodied in the Codes, had a long judicial career at Orleans.

Yet it remains true that the authority of Pothier's writings did not depend on his position. In modern French commentaries the reported decisions both of French courts and of Belgian and other foreign tribunals administering codes of the French model are freely cited; but they are not treated as having more than persuasive authority even in their own jurisdiction, except where a uniform course of decision has thoroughly settled the practice ("jurisprudence constante"); nor are they held entitled in themselves to greater weight than the conclusions of the leading text-writers.

In the main, after all just allowances, our fundamental antithesis holds. Doctrinal opinions of writers may acquire authority in the Common Law when and so far as the Courts adopt them. Judicial decisions and reasons may acquire authority (not exactly the same kind of authority) in the modern civil law when and so far as they are received into the body of recognized learned opinion. In either case this process has been especially frequent and operative during the past century, and to that extent Common Law students and civilians are now more favourably situated for appreciating one another's methods.

Legislation, being the act of sovereign political authority, cannot be expected to bear the marks of a prevailing school or method of legal science to the same extent as either judicial decisions or professional literature. Yet we may note that European Continental lawgivers have been more in touch with scientific jurisprudence than English-speaking legislatures. They have consolidated the results of technical learning on a larger and bolder scale¹; they have been less prone to make particular innovations without regard to their effect on the body of the law; they have spoken in the language of expositors who count on being reasonably understood and are not astute to guard against perverse misconstruction. It has been observed somewhere that if an English-speaking lawyer wants to enter into the spirit of the French Code Civil, he should begin by regarding it not as a codifying statute in our English sense but rather as a book of concise Institutes. It may seem a reproach, to a mind entangled in insular prejudices, to say that the Continental legislator is something of a pro-

¹ In commercial law, however, great advances have been made throughout English-speaking countries and in British India. Unfortunately Parliament and the Government of India have more than once codified the same law in different forms, and there is no immediate prospect of uniformity.

fessor; in truth it is a commendation, and if any censure is implied it is for our own uncouth and disorderly verbosity, which gives more occasion for captious disputes than it removes, and makes our written laws a hopeless riddle to the citizens who have to obey them. The best that can be said for our desultory fashion of statute-making is that it avoids the danger of premature definition and of stereotyping dogmatic opinions already in their decline. But it is far from certain that even so much negative virtue can always be counted upon. There is no effective reply to the charge that our legislation is too much under merely political control; and it is at least doubtful whether the substitution of direct popular control, as advocated and to some extent practised in some American jurisdictions, is likely to be an improvement.

It would be rash to express any confident opinion about the general trend of European Continental speculation, and its probable continuing effect, so far as disclosed by the chapters translated in the present volume. Evidently we are living in a period of wide-spread reaction against the individualist bent of the eighteenth and early nineteenth centuries, which found ample congenial matter in the classical Roman jurists. Throughout the civilized world the pressure of social needs is increasing the active functions of the State and discrediting hard and fast theoretical limitations of its control over particular interests. So far from the common power being relegated to merely administrative duties, public law is everywhere growing at the expense of private law. At this day a fresh impulse in the same direction, whose effects will not cease with the cessation of hostilities, is given by the prevailing war conditions. As I write we see the President of the United States, for the second time within living memory, invested with all but a dictator's war power. The liberty of the subject is good in time of peace, but must give place when the free peoples of the earth are fighting for their very life and liberty against the most wicked and relentless despotism that ever set out on the adventure of subduing all things to its evil will.

Partly for the same reason, partly because at the close of the war several juridical and constitutional problems of the first importance will demand attention, it must now be long before schemes for the assimilation of commercial law, such as are recorded in the latter part of the present volume, can be resumed or prosecuted with effect. In fact, the topics that have hitherto employed cosmopolitan associations and congresses fall now into two classes: those which must be dealt with by more authoritative methods

(though the business will be neither quick nor easy) and those which have to stand over for a while.

Yet no man can tell how near a present world-movement may be to its height, or whither the next deflection may tend. From history, at any rate, we may learn to be cautious in prophesying. We may be sure that the old individualism will not be restored in anything like its old form; and we cannot be sure that the last word is with any of the competing doctrines which agree in repudiating it, but diverge widely in other respects. About fifty years ago the triumph of individualist doctrine appeared to the best observers to be complete. Maine had set the seal to it by a brilliant aphorism (whatever may have been the bounds of the application intended by himself), and the word went forth that civilization was moving from Status to Contract. In point of fact the climax was then already past, and Maine himself was forging weapons to be used in ousting the secure masters of the dominant school from their strongholds. It was not without cause that he met with a pretty cold reception at the hands of J. S. Mill's disciples, perhaps more consistent herein than their master, whose own orthodoxy was not unblemished. The stubborn remnant of that school may console itself, if it can, with the reflection that the newer teaching now in vogue may prove not much more adequate to cope with the problems of a world which, for better or worse, will be transformed when it stands clear of the present confusion.

Meanwhile, even in pure politics, invention born of necessity is at work. For several months the resources of the British Empire have been wielded by an executive not capable of description in the terms of any received constitutional theory. The War Cabinet includes members from overseas — not assessors but full members — who are not answerable to the British Parliament. While we are still debating how to call the Dominions to our councils, they are summoned to an active share in command. Modern parliamentary government was supposed to involve, as a necessary element, the collective and undivided responsibility of Ministers to the House of Commons. That rule is in abeyance, and for the conduct of imperial affairs, at any rate, we shall hardly see it revived.

Whatever cosmopolitan developments of political and legal ideas are in store for our children, it is certain that the thought and action of the rulers of men in English-speaking lands will have a far greater part in shaping them than could have been foreseen a few years ago.

THE PROGRESS
OF CONTINENTAL LAW
IN THE NINETEENTH CENTURY

PART I

THE MOVEMENT FOR
THE READJUSTMENT OF LAW TO
CHANGED SOCIAL AND POLITICAL CONDITIONS

CHAPTER I. DOMINANT LEGAL IDEAS IN THE FIRST HALF OF
THE CENTURY AFTER THE FRENCH REVOLUTION.

CHAPTER II. DOMINANT INFLUENCES TOWARDS LEGAL CHANGE
IN THE SECOND HALF OF THE CENTURY.

CHAPTER III. CHANGES OF PRINCIPLE IN THE FIELD OF LIBERTY,
CONTRACT, LIABILITY, AND PROPERTY.

CHAPTER IV. CHANGES OF PRINCIPLE IN THE FIELD OF FAMILY
AND PERSONS.



CHAPTER I

DOMINANT LEGAL IDEAS
IN THE FIRST HALF OF THE CENTURY
AFTER THE FRENCH REVOLUTION

BY ALEXANDER ALVAREZ¹

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| <p>§ 1. Influence of the Philosophy of the 1700s upon the Law of the French Revolution.</p> <p>§ 2. Influence of the Philosophy and the Economics of the 1700s upon the Napoleonic Codes.</p> <p>§ 3. The Postulates underlying the</p> | <p>Napoleonic Codes.</p> <p>§ 4. The Dominant Ideas in Property Law and Family Law.</p> <p>§ 5. Social Influence of the Code Napoleon.</p> <p>§ 6. Influence upon Legal Science in general.</p> |
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§ 1. **Influence of the Philosophy of the 1700s upon the Law of the French Revolution.** — A characteristic of the 1700s in France was the development of the philosophical spirit, — the *classical mind*. There were many causes.² Society was at that time searching for principles that would permit of a reorganization

¹ [This Chapter is from pages 3–47 of the author's "Une nouvelle conception des études juridiques et de la codification du droit civil" (Paris, 1904, F. Piehon and Durand-Azias, Librairie générale de droit et de jurisprudence, being Vol. IX of the "Bibliothèque internationale de l'enseignement supérieure", edited by F. Picaret.

M. Alvarez is a doctor of law of the Faculty of Paris and graduate of the "Ecole des sciences politiques." He is a member of the Curatorium of the Academy of International Law at The Hague, established with the coöperation of the Carnegie Endowment for International Peace. He is also Counselor to the Legations of Chile; member of the Permanent Court of Arbitration; delegate to the Fourth Pan-American Conference; former Professor of Comparative Law at the University of Santiago; associate of the Institute of International Law; Secretary-General of the American Institute of International Law.

Among his other important works are the following, on topics related to the present: "De l'influence des phénomènes politiques, économiques, et sociaux dans l'organisation de la famille moderne" (Paris, 1899); "Latin-America and International Law" (American Journal of International Law, III, 269–353); "Le droit international Américain" (Paris, 1910).

The remaining chapters of this author's book "Une nouvelle conception", etc. are translated in Vol. IX of the Modern Legal Philosophy Series, "The Science of Legal Method" (Boston, 1917); they deal with the methods of codification and judicial decision. — Ed.]

² J. E. M. Portalis, "De l'usage et de l'abus de l'esprit philosophique durant le XVIII^e siècle" (3d ed., Paris, 1834), chaps. 1–ix.

upon new foundations. Philosophy, therefore, became *social*; every philosopher was duplicated as a publicist. Moreover, economists of the period were studying political economy and law together.¹ For these reasons the doctrines of the philosophers and economists of the 1700s exercised a considerable influence upon the law of the succeeding period.

(1) *A Natural Order Governing Society*. — All were imbued with the earlier idea of natural law, and this they strengthened and developed. They believed too — and here they were pioneers — that society was governed by a natural order and that the rule of its operation must be discovered. The economists accepted this natural order as the point of departure of their speculations; for them the whole of political economy was reducible to the mere determination of the laws inevitably regulating the entire body of economic facts, independent of all considerations of time and space.

The philosophers also set out from the same idea of a natural order. It can be found beneath all their speculation. Montesquieu applied himself to the study of history and law in order to extract a philosophy from them. In like manner Condorcet searched for the philosophy of history, and having observed the past evolution of society, he believed in its indefinite progress. Diderot and d'Alembert attempted a synthesis of human knowledge. Their method of investigation harmonized with the idea of a natural order and with the social conditions of the period. It combined, in varying degrees, observation, reason, and idealism.

The philosophers were students of ancient and modern times; but they also observed the society in which they lived; and this examination was, indeed, the distinctive feature of their doctrine. But the starting point of the speculations by which they aimed to realize a social ideal was not observation. They began with an "a priori" conception of society and human nature. Their method led them to reject the past and to believe that, far from being the parent of the future, it obstructed its realization. Hence, in their minds, the annihilation of the past became the very condition of progress, and they counted in everything upon a future which was to realize the concepts of reason.

Reason was omnipotent to them. It seemed able to accomplish whatever it could conceive; to Reason alone they turned for the social reorganization of which they dreamed. They were revolu-

¹ Turgot was the first at that time to separate the study of political economy from that of law. Cf. *Cossa*, "Histoire des doctrines économiques" (Fr. trans., Paris, 1899), p. 278.

tionists, desiring a new society reconstructed upon new and purely rational principles. Their doctrine thus assumed dogmatic tendencies, and rose to a religion.

The social philosophy of the 1700s strove to set up an idea which had inspired it: *individualism*, that is, the greatest possible liberty in the individual.¹ Their individualism was evolved out of a rational speculation that was hostile to the political and economic conditions of the time. The chief characteristics of the period were royal despotism; inequality in the status of persons and in land ownership; obstacles to industrial freedom, commerce, and industry; oppressive taxation; and the mercantilist and protectionist theories. This individualism, we should note, was not opposed to State interference. On the contrary, the latter's influence was to be exercised in order the better to insure the development of the faculties of the individual.

(2) *The Individual and Property the Bases of Law*. — The juridical ideas of the philosophers and economists were in accord with individualism and the rationalistic and idealistic method.

The conception of the individual and of the right of property were at the basis of social reorganization, they believed. Man was always imagined living isolated, without relation to his fellow beings, and enjoying, in a state of nature, an almost absolute liberty. Human relations existed only by the will of individuals, not by virtue of ties uniting them to one another. They attributed great importance to life in society, and reached no less a conclusion than that the final object of society was the individual. Hence, respect for man as a person, that is to say, for the rights of the individual and of property, was the component but sole rational basis of law, and its guarantee the supreme aim of legislation.

Lastly, they declared that legislation must be the sole source of positive law and should normally govern society. Statutory law was merely human reason made concrete in the particular hypothesis under consideration.² It ought, therefore, to be uniform, simple, inspired by rationalistic principles, and expressed in concise formulæ.³

¹ For the manner in which individualism is illustrated in the doctrine of these philosophers and economists, *Henri Michel*, "L'idée de l'État" (Paris, 1896), introd., pp. 30-89.

² *Rousseau*, "Contrat social", bk. II, chap. xi; *Montesquieu*, "De l'esprit des lois", bk. I, chap. iii.

³ *Mably*, it is true, protested against the idea that legislation should be expressed in "majestic brevity"; "De la législation ou principes des lois", in "Collection complète des Œuvres de l'abbé Mably" (Paris, 1794-1795), Vol. IX, p. 296.

(3) *Public and Private Law.*—They distinguished in their doctrine between public and private law. The former was the principal and almost the exclusive subject of their interest, — a fact explained by the political and social conditions of the period. Private law was dealt with more particularly by the economists. In public law, the publicist-philosophers desired to reconstruct society upon bases that were entirely new, in the sense that they were to be derived from pure reason. These new foundations, which they formulated with great precision, were the unrestricted and private right of property, the guarantee of the rights of man, the sovereignty of the people, and the separation of the powers of government. To reconstruct society, they invoked the interests of the people as a whole, but this general interest was itself safeguarded only so long as the individual enjoyed all the rights inherent in his person.

When the philosophers approached the problems of private law, they reasoned somewhat differently. Liberty of the individual was still the ideal towards which law should strive; but it did not seem to them that man could act save as moved by his own interest rather than by social interest. Private law, therefore, had to formulate rules by which the liberty of each could co-exist with the liberty of all. This they called the relationship of co-existing individuals. The legislator, consequently, was not obliged to weigh the degree of morality of each person's acts. It sufficed that the liberty of another was not to suffer by them.

In this the philosophers were less hostile to traditional doctrine and did not pretend to create private law at a stroke. Roman, canon, and feudal law seemed antiquated to them; but customary law, which appeared more inspired by present social needs, found favor in their eyes. In this they were not in agreement with the legists (or professors of the Roman civil law) who remained faithful to the whole body of early legislation. On the other hand, like the latter class, they believed that the advantage of codification would be to introduce unity of legislation throughout the realm.¹

Though they formulated the rules which were to guide the legislator at his task,² they were not concerned as to how law, once crystallized into texts, was to adjust itself to the new necessities of a social state, forever undergoing change. They were, however,

¹ *Voltaire*, "Dictionnaire philosophique" (ed. *Garnier*), Vol. III, pp. 614, 619, and 626. *Cf. Diderot*, "Œuvres complètes" (ed. *Garnier*), Vol. IV.

² *Montesquieu*, *op. cit.*, bk. XXIX, chaps. xvi-xix; *cf. Mably*, *op. cit.*, Vol. IX, bk. III, chap. iii.

herein consistent. According to their view, legislative enactments were the sole rules of society, and thus need not be concerned over the inevitable transformations which society might have to undergo.

(4) *Revolutionary Efforts at Codification.* — The Revolutionists were deeply imbued with the ideas of the philosophers and economists of the 1700s. They were unanimous with the latter in believing that the Old Régime must be overthrown and replaced by another, wherein, to constitute the normal order, law should be founded upon rationalistic principles.¹

So far as public law was concerned, the task was easy. In establishing new principles the Revolution did not have to free itself from a body of doctrine justifying the old order of things. The work, nevertheless, presented difficulties when it came to property rights. Then more than at any other time, the problem presented was political (and so falling within the category of public law) as well as economic (and so comprised within private law). The question was, in fact, how to free property from the feudal burdens which weighed upon it and to make it the cornerstone of the new political and economic organization. Thus the Revolution both destroyed the Old Régime and through its constitutions created at a stroke a new political order resting upon the principles of unrestricted private ownership, the rights of men, the sovereignty of the people, and the separation of governmental powers. The new order had no traditional basis. Individualism, rationalism, and idealism triumphed. But the victory of individualism was in no wise inconsistent with the recognition of the supreme power of the State, which was regarded as sovereign merely in order to assure to each citizen a maximum of liberty.

It was bound to be otherwise in private law. The idea of codification and, consequently, of unification of the law, was everywhere an accepted principle. It was not, in fact, new in Europe; for several countries had already codified their civil law.² The French monarchy also had approached the task of codifying French law; but it failed for political and social reasons.³ The way

¹ *Michelet* in his "Histoire de la Révolution Française", Vol. I, introd., well said: "I define the Revolution as the coming of law, the resurrection of right, the reaction of justice."

² *Planiol*, under head: "Code civil", in "Grande Encyclopédie", p. 794, and the same author's "Traité élémentaire de droit civil", Vol. I, sec. 125; also *Glasson*, "La codification en Europe au XIXe siècle", in "Revue politique et parlementaire" (1894), Vol. II, pp. 201-202.

³ Cf. *Sagnac*, "La législation civile de la Révolution française", introd., chap. I.

being smoothed after the Revolution (which had been both political and social), several persons presented drafts of codes to the legislative assemblies of the period.¹

But now that it was no longer a question of opportunity for the idea but of the manner in which codification was to be effected, harmony of course vanished, and jurists and philosophers no longer agreed. The struggle varied in intensity with the different phases of the revolutionary period. Under the Constitutional Assembly it was bitter, and the laws of that period were, therefore, compromises; under the Legislative Assembly the traditional views lost ground; under the Convention rationalism triumphed completely. All prior legislation was treated as belonging to uncivilized epochs. Rationalism so gained the ascendancy that the aim was to reduce the codes to a minimum of provisions, for fear of fettering the free action of the individual.

A legislative committee was charged with drafting a civil code, and Cambacérès presented it to the Convention. In his report he explained the principles underlying the draft. It reveals plainly the exaggeration of the philosophical tendency of the period; for example, in such phrases as "the firm ground of the laws of nature and the virgin soil of the Republic." He desired laws to be neither too few nor too many, since conciseness was an object. Only a few texts of law, pronouncing the general principles, were needed. "The legislator should not aspire to declare everything; but, after having laid down the generative principles anticipatory of many doubtful points, he should undertake an elaboration leaving but few questions for determination." Laws, he added, should be drafted with clearness and precision.²

In spite of the very small number of provisions contained in this Code, the Convention judged it too complicated and not sufficiently radical and philosophical.³ By a Decree of November 3, 1793,⁴ it entrusted a commission of philosophers with the preparation of a code to be conceived in accordance with the new ideas. The Decree, however, was never carried out. Later a new committee was appointed to prepare another draft, and this was likewise presented by Cambacérès. In a second report he limited himself to saying, when he explained the principles underlying the new

¹ *Sagnac, op. cit.*, pp. 46 *et seq.*

² *Fenet*, "Recueil complet des travaux préparatoires du Code civil", Vol. I., pp. 2 and 3.

³ *Edgard Quinet*, "La Révolution" (ed. commemorative of 1789), Vol. II, bk. XV, § 11.

⁴ *Sirey*, "Lois annotées", Vol. I, p. 273.

codification, that this draft was but "the Code of Nature, sanctioned by reason and guaranteed by liberty."¹ This second draft also failed of adoption; it was criticized as being a table of contents rather than a code of civil law.² All the laws voted by the Convention were inspired by the idea of unification. The Roman and canon law were held in contempt; on the other hand customary law was drawn upon though adapted to the new order of the period.

After 1795 the primarily philosophical ideas of the Convention lost favor. The desire was expressed for a more detailed code than the preceding drafts, and the Convention was asked to give consideration to the entire body of prior legislation. It was an obvious reaction towards traditional views. Rationalism had lost ground; and Cambacérès reflected this state of mind in his third draft.³

All these drafts of the revolutionary period show a steady improvement in redaction. Their method, clearness, and precision exhibit an evident progress in legal thought, a progress due in great part to the writings of the philosophers, whose works were remarkable for these qualities.

(5) *Crystallized Law and Changing Society*. — During the whole of the revolutionary period no one doubted but that legislation must be the sole source of law; and yet no one concerned himself as to how harmony was to be secured between codified law and the progress of social life. Was it imagined that, once the law was codified, society would be able to shape its needs to its laws, and that jural life would stop, crystallized into unchanging texts? Or was it believed that it properly fell to the legislator of the future to solve the problem by periodic revision? The legislative labors of the period give us no clue.

In the first draft which he presented to the Convention, Cambacérès appeared indeed to have given concern to this question and to have attempted its solution. He desired, — and this was the dominant idea of the period — that codification should be limited to establishing broad generative principles. He seemed to intend that legislation should only lay the jural foundations upon which the whole law was to be built up by spontaneous development. It would have been a satisfactory solution from the theoretic as well as from the practical standpoint. Unfortunately

¹ *Fenet, op. cit.*, Vol. I, p. 109.

² *Id.*, Vol. I, p. xlvii.

³ *Id.*, Vol. I, pp. 141-142, 175, 176.

it was destined not to be adopted. The idea was not developed, nor even formulated with precision. On the contrary, it was the general belief of that period, by way of reaction against the excesses of the Old Régime, that law should not develop spontaneously; the judge should be limited to the function of a mere interpreter of legal texts, and he was refused any latitude to transform old or to create new rules.

§ 2. Influence of the Philosophy and Economics of the 1700s upon Codification. — The Consulate really initiated the true period of French codification. Napoleon used his power and prestige to accomplish the work. In it he recognized not only a social need but also a political instrument to consolidate the new order of things. The time was favorable for the accomplishment of this task, which had been hindered during the Revolution by the political unrest of the period and by the want of agreement in legal and philosophical minds upon the underlying principles and governing ideas which should enter into the new legislation.

It is impossible to understand correctly the significance of this codification, the ideas which inspired it and the influence exercised upon it by the philosophers of the preceding century,¹ unless we appreciate the political, economic, and social conditions of France at that time. The Old Régime had disappeared; a new political order had succeeded and was already becoming firmly established. The new order had been founded upon the novel principles for which the Revolution had been fought. It was possible to adhere to the ideas which dominated the Revolution, that is to say, to create at a stroke something new, founded on reason and abstract principles. This was true because political changes do not touch very closely the legal relationships between individuals. And, moreover, no one dreamed of codifying public law, particularly administrative law, at that time. This is not surprising when we remember that this branch of law did not exist and, in fact, could not exist in pre-revolutionary France. While the Revolution made its existence possible, it was still of too recent date and could not, for want of time, have been sufficiently elaborated.²

Imperial despotism and a form of suffrage limited by property

¹ As yet, no one has studied the influence of the philosophers of the 1700s upon the codification of private law. One might be misled by the title of certain works, as, *Lerménier*, "De l'influence de la philosophie du dix-huitième siècle sur la législation et la sociabilité du dix-neuvième" (Paris, 1833).

² Cf. *Ducrocq*, "Cours de droit administratif" (7th ed., 1897), Vol. I, pref., §§ 1, II.

qualifications were two facts which give an idea of the political situation of the period. If we turn now to its economic and social condition, we find that the system was that of the petty industry. The population was largely agricultural; movable wealth hardly existed. The legal relationships of individuals were comparatively few; they were wholly individualistic in character, well defined, essentially national; and they changed but very gradually. There was no social problem to solve,—only a question of pauperism, falling in the sphere of a poor law. The working class was not clamoring for a labor code. Indeed, its condition interested no one, whether government, society, or codifiers. Wage-earners formed no political party but were disunited over the whole country.

From these observations we see that the problem of the codification of private law might have been stated in these terms:

(a) Contrary to the case of public law, the legislator could not, in constructing a body of private law, draw exclusively upon rational principles. Private law governing the relationships of individuals, it was impossible wholly to ignore the past. Jurist and legislator agreed to renew the past, though they desired to make it accord with the new principles proclaimed by the Revolution, especially that of the right of property, unburdened of all feudal charges. The inequalities sanctioned by law, based upon person or property, were no longer conceded. It was also agreed that the new legislation should be a compromise between the two sources (Roman and customary) of pre-revolutionary law; the sole question was to determine which should be given predominance.

(b) The unification and simplification of the law was to be worked out to conform with individualistic principles, so as to harmonize with the other institutions, sprung from the Revolution. Individualism was to govern, therefore, not only the relationships between the individual and the State, but also between individuals themselves. The law of private property was to be made individualistic for two reasons: because private, not social, interests were to weigh; and because, in their mutual relationships, individuals were to be considered as though living isolated from one another.

(c) The provisions of the new legislation were no longer to be excessively brief but were to receive certain clear and precise elaborations.

We see, then, how great was the influence of the philosophy of

the 1700s upon the legislation of the 1800s. To appreciate clearly the correctness of the foregoing summary, and to comprehend the legislative labors of the year VIII (1799–1800), we must now turn our attention, first, to the underlying principles or postulates upon which the codification rested; and second, to the governing ideas from which it drew to regulate the law of property and family.

§ 3. **The Principles Underlying Codification.**—The postulates of the codification tended to unify and simplify the law, rendering it clear and precise and at the same time eliminating the defects of the old legal system in this regard. It is important to note that these postulates did not obtain in public law and were unknown to the old system.

Let us now consider the more important of them.

(1) *Statutory Law was to be the Sole Rule Governing Legal Relationships*; for it was enacted by the legislative power and remained until repealed. The Civil Code was, therefore, to govern the whole body of relationships of private law, co-ordinating into one harmonious and systematic whole the various jural institutions comprised within this branch.

The Committee which prepared the draft of the Civil Code reacted against the earlier revolutionary tendency which favored a too brief codification. In his preliminary report made upon presenting the draft of the Committee, Portalis said: “At the opening of our conferences, we were impressed by the opinion, so generally held, that in drafting a civil code a few very precise provisions upon each subject would suffice, and that the great art was to simplify all by anticipating all.”¹ Moreover, the authors of the Civil Code, while contemptuous of the sources of the old law, particularly of custom, were not so exclusive in this regard as the philosophers of the 1700s and the revolutionary legislators. It seems clear that, though statutory law was for those authors the principal source of law, it was not the only source. Bold as this assertion may appear, we believe that it can be verified in the report of Portalis. He certainly recognized that the legislator could not regulate or foresee everything; and the Committee, in preparing its report, did not make the attempt. “A host of things,” continued Portalis, “are necessarily left to usage, to the discussion of men learned in the law, to the decision of judges. . . . The function of statutory law is to fix, in broad lines, the general maxims of the law, to establish principles that will be fecund in consequences, and not to descend to the details of questions that

¹ *Fenet, op. cit.*, Vol. I, p. 467.

may arise in each subject. It is for the judge and jurist, imbued with the general spirit of the laws, to direct their application." In all civilized countries (as he later pointed out) there grew up alongside the statutory law a body of maxims, decisions, and doctrines which have always been regarded "as a true supplement to legislation."¹ He then showed what rules were to be followed in case there was no explicit provision covering the question which the judge was called upon to decide, and he spoke of usage and equity, which he described as a return to natural law.² Article 4 of the Civil Code, furthermore, certainly seems to recognize implicitly that the Code does not encompass the whole law, since where it is silent it leaves to the judge the task of himself creating the rule to be applied.

In spite of the very positive declaration of Portalis, and of the terms of Article 4, writers and courts, at least from the beginning of the second half of the 1800s, held it as an indisputable principle that statutory law constitutes the sole juridical rule. Consequently, they held that the relationships of private law depended without exception upon the rules of the Code.³ It is important, however, to remember that the provisions of the Code constituting the law of property are in conformity with the individualistic doctrine, meant to be solely interpretative or supplementary of the intent of the parties. The rule of law governing the matter is that the parties' will is autonomous. It is for the individual to make his own rule of law, in the absence of any legislative provision to the contrary.

(2) *The Law was to be the Same for All*, and was applicable throughout all parts of the Republic, without any room for modifications by reason of differences in the localities where enforced.

Public law no longer, as in feudal times, permitted a hierarchy of persons and lands; consequently there must needs be equality of all citizens before the civil law. Such equality, however, was not made an absolute principle in the Code. It did not exist between subjects and foreigners, between those who owned property and those who did not, or between husband and wife, any more than between legitimate and illegitimate children. The Civil Code, indeed, contained very harsh provisions affecting the foreigner, and it was Napoleon himself who secured their adoption. The

¹ *Fenet, op. cit.*, Vol. I, pp. 469-470.

² *Id.*, Vol. I, pp. 470-476.

³ For the motives leading to the adoption of this theory, cf. *Gény*, "Méthodes d'interprétation et sources en droit privé positif", §§ 37-50.

foreigner did not enjoy civil rights,¹ he might not inherit,² nor receive a gift or legacy.³ In regulating their legal relations the Code recognized the economic inequality between the mercantile and the non-mercantile classes which was a mark of "bourgeois" prejudice. But it did not recognize another economic inequality, quite as general in character, namely, that existing between the owning and the non-owning classes. Protection to property rights in land was regarded by the Code as of first importance, and it was the owner, namely, the "one who has", whom the Code kept in view in regulating the rights of individuals. The interests of the "have nots" were not safeguarded, and this is explained by two facts: that the Revolution had been a victory of the middle class, not of the proletariat, over the privileged classes; and that as yet no social problem had arisen. No such distinction, therefore, was made by the Civil Code. There is no call here to revamp the attacks of the socialists on the Civil Code, but it is certain that the facts exist on which they base their attacks.

The legislator of course recognized the jural personality of the individual; he regulated the law of real property, the protection of which was one of the fundamentals of the Code; he freed it from feudal burdens and secured its exclusive enjoyment to the owner. But nowhere did he guarantee to the individual who had nothing the right to a physical existence and the right to work, which the revolutionary Constitutions had proclaimed. It may of course be objected that these are matters of administrative and not civil law.

To protect the middle-class property-owning family, the Code safeguarded the estates of minors and married women; it allowed the latter to plead the invalidity of their own acts and contracts when not authorized by their husbands; the law gave them a general lien upon the property of their husbands for the restoration of their marriage portion; they might renounce community as a matrimonial property system. All were provisions presupposing a certain affluence in the home. While proclaiming the principle of liberty of contract, the Code opposed the power of the owner to squander freely his estate and so created a guardianship over spendthrifts. The law even protected the property of persons of age by admitting the invalidity of contracts because of gross failure of consideration ("lésion"), or of a sale because of a defect

¹ Art. 11.

² Art. 726 [changed by the Law of July 14, 1819. — TRANSL.].

³ Art. 912 [repealed by the same law. — TRANSL.].

in the thing sold; it limited, too, the rate of interest. Thus in three different instances it protected the interests of owners: where they were lacking capacity to take charge of their own interests, where they squandered their property, and where they had been victims of fraud.

On the other hand, it did not regulate the contract for the hire of services, which was the most important contract the workingman could enter into; nor did it dream of protecting him against his own heedlessness. Nothing prevented him from squandering the only capital which was really his, — the strength to labor. He might imperil it as he pleased. There was no provision preventing the contract of hire of services from injuring those who promised their services, nor from compromising their health or moral standards. While contracts relating to property were regulated, the agreement to work and labor was left to the will of the parties. The Code even manifested its favor of the capitalist class by the suspicion in which it held the workingman in Article 1781.¹

In the working class in contrast to the middle class neither the family nor the wife was protected; the only fortune of the female worker, her wages, went into the community property. The Code, furthermore, established an institution particularly unfavorable to the laboring class, namely, civil arrest. It was a means of constraint which might be used against any debtors. But the workingman almost alone was called upon to suffer its effects, since he had no capital permitting him to meet his obligations.

The only measures in protection of the laboring-man which can be cited were the two provisions creating a lien in favor of a certain class of workers, the domestic servants, and intended to secure with greater certainty the payment of their wages.²

Nor did the Criminal Code establish the principle of equality between the two classes, the holding and the working class. It punished association, union, strike, the only weapons which the workingman had to make good his economic demands.

The Code also sanctioned the inequality of rights between husband and wife. By way of reaction against the excesses of certain of the revolutionary laws, it did not treat legitimate and illegitimate children alike, but denied the latter certain rights accorded the former.

¹ [Repealed by Law of Aug. 2, 1868. — TRANSL.]

² Arts. 1798, 2101, 2103, § 4, of the Civ. C. and Art. 191 of the Com. C.; regarding wages in possession, *cf.* Art. 592, C. Civ. Proc.

It was, therefore, only in appearance that the Civil Code granted equality. It was at bottom anti-democratic; it only protected the rights of the individual so long as he was an owner or employer. It constituted, therefore, a body of law in the interest of the middle class; it was far from egalitarian; and it favored power, for it established, for example, the authority of the father of the family and of the master.

(3) *Law's Excessive Logic.* — Legislation was to set out from a certain number of general principles and their consequences were to be elaborated in its provisions; the result was that its rules were marked by an excess of logic.

All groups of facts of the same order were governed by the same principle. The deductions from this principle were the same, regardless of the special nature of the facts in question. The legislator was not concerned whether the principles formulated by him might be conveniently applied to an anticipated set of facts; his aim was solely that those principles be followed out by rigorous logic. He admitted the fewest possible exceptions, for fear that they would injure the harmony of his work. He insisted primarily upon giving a logical character to his provisions and upon drawing all possible conclusions from the principles which he declared to govern a given class of facts.

(4) *Penalties.* — The guarantee of the observance of the law was not to lie in the surveillance of the legislator, but in the penalty attaching to it.

The penalty varied according as it was a question of property or of family rights. In the law of property the penalty consisted in the loss of the right, in arrest, the voidness of the transaction, or in damages. In family law the penalty resulted in certain consequences to private right, the separation of estates, absolute and limited divorce, disqualification to inherit, etc.

(5) *Extreme Precision.* — The extreme precision of the law prevented its adjustment to the facts calling for its application. The rules of private law, by very reason of their precision, had neither the flexibility nor breadth of those of public law. By lack of flexibility we mean that neither writers nor courts could shape them to the new requirements of social life, and that they did not vary according to the particular cases which might arise. By lack of breadth, we mean that they could not be extended to cases which the legislator had not foreseen, and at the same time commentators and judges were forbidden to create new rules of law on the ground of meeting new social needs.

It is notable that in the law of property the texts possessed absolute precision. It was only exceptionally that they employed terms having a general meaning, such as 'good morals' and 'public policy.' With regard to family law, the texts were in general broader and left to the interpreter a certain discretion. This was the case in all matters relating to the reciprocal rights and obligations of married persons, or parents and children, and to the causes of absolute and limited divorce or of the separation of estates.

If the law was thus narrow and wanting in the desired breadth, it was because the legislator wished his rules to be uniform, that is to say, that a like solution should apply to all the like cases that might present themselves. He went so far as to ask unity of interpretation, and it was with this intent that he established the Supreme Court of Errors.

The legislation being thus precise, how was codified law to be kept in harmony with the fresh needs of society? The legislator of the year VIII (1799-1800) did not ask himself this question any more than did his predecessor of the Revolution. Why? Did he believe that codification would result in halting jural life so that the law could progress only with the assent of the legislator? The preparatory reports of the codifiers were silent in this regard. This may be explained, first, by the desire to bring to an end the Old Régime by firmly planting the New upon the basis of legislative unity; and further, by a disregard for the evolution of jural life, which it was believed could be directed into the channels prepared by the Code, which in his eyes constituted written Reason and was destined to play the same rôle as Roman law. His silence was the more excusable in that the Commission had before its eyes only the Roman legal system, which had endured more than twenty-five centuries. The law-maker of the year VIII might well pass this problem by. His duty was to provide for the present, and it was not surprising that he was not preoccupied by a consideration of the future.

Nevertheless, Portalis had foreseen the difficulty. He showed, indeed, in his preliminary report, by citing the example of Roman law, that codification could not and should not resist the development of law; for that law would continue its evolution nevertheless. But how was this evolution to take place thereafter? This he did not say. He was content, like Cambacérès in the preparation of the prior drafts presented by him to the Convention, to provide for the cases where no exact text was directly applicable, by leaving

a broad power of interpretation to the judge; he even empowered him in that case to create the rule of law to be applied, provided that it was in conformity with usage and equity. But this power, besides being contradictory to the character of preciseness in legal texts, was not broad enough to make it possible for the judge to hold in even pace the twofold evolution of law and society.

§ 4. **Property and Family.** — What were the governing ideas by which the legislator regulated the law of property and family? This is what we shall now examine.

Upon this point the legislator reacted in a very definite manner against the rationalism of the philosophers of the preceding century and of the revolutionary laws. He realized how impossible it was to erect in a day an entirely new edifice of law. Portalis declared in his preliminary report that it would be well to be sparing of innovations,¹ and that respect for tradition should guide the legislator. And this principle they followed. The Code of 1804 was moderate and wise; it was neither reactionary nor imprudently radical; it neither sought to restore the institutions of the Old Régime nor to renew the attacks of the Revolutionists.² It took as its basis the law of the Old Régime and sought to reconcile the rules of the customary and the written law, rejuvenating both through the principles which had served as a foundation for the public law of the Revolution.

We must now examine separately the law of property and of family, if we would understand the governing ideas on which the Civil Code was built.

(1) *Property Law.* — In the law of property the legislator, animated by the "Declaration of the Rights of Man", set up the principle of the liberty and equality of all citizens before the law (save for the exceptions already noted), and the right of private ownership freed from the burdens of the Old Régime.

The law of property was, therefore, essentially individualistic. It protected the individual interests of persons, especially of those who were property owners, and neglected the societary interests, for it conceded (in harmony with the orthodox economic doctrines) that the individual, by the very fact of acting in his own interest, contributed to the general interests. The legislator had

¹ *Fenet, op. cit.*, Vol. I, p. 466.

² In confirmation, *cf. Dufour*, "Code civil avec les sources où toutes ses dispositions ont été puisées" (4 vols., 1806); *Valette*, "De la durée persistante de l'ensemble du droit civil français pendant et après la Révolution de 1789", read before the "Académie des Sciences morales et politiques", Dec., 1870 (Paris, 1872).

in view, then, a type of individual actuated by selfish motives and not restrained by the surroundings in which he lived. Besides this, the individual was always looked upon as acting alone to obtain his end. While the Code regulated the contract of partnership, it prohibited association (labor unions, etc.), — a subject which is erroneously considered even to-day as a part of public law, having no relation to private law. Thus the individual was supposed to conduct himself not as having interests in common with his fellow-men, but as opposing his interests to theirs.

As a consequence of its conception of the relation of the individual to society, the Code assumed that it was for the individual himself to look out for the satisfaction of his necessities, and it abandoned him to his own untrammelled efforts.

Since the individual acted only as an isolated person and in accord with his own interest, and since that interest appeared necessarily to be opposed to others', the law of property had the task of placing bounds to this interest and of guaranteeing it. Its function was to make possible the co-existence of individuals, the limits of whose interests exactly coincided with the limits of other persons' interests. It had to regulate the relationships of co-existing individuals; but in no particular had it to attend to the grouping of the divergent individual interests into social interests, such as would result in the creation of ties of co-ordination and solidarity. As a consequence of this dual individualism, it did not admit of the supremacy of social interest over individual interest, save as an exception.¹ Furthermore, no article of the Code established the principle of mutual assistance, of the misuse of rights, or of the extension of liability beyond cases of actual culpability (which principles, we shall see, are the triple manifestation of solidarity in the domain of law). For the legislator, these were considerations quite foreign to law, belonging rather to morals. He admitted only rights balanced by clearly defined obligations; he seemed unconscious of the idea of duty as moderating a right or enlarging an obligation.

Of the two schools of morals till then existing, that of the philosophers of the 1700s and that of Christian morals, the Code adopted the former, founded as it was upon respect for liberty and acquired rights. The latter was left in the shadow, by rejecting the ideal of fraternity upon which it was founded, as one belonging to the forum of conscience. So far as it rested upon a basis of individualism, the law of property looked upon (*a*) the will of the individual as au-

¹ Arts. 6, 686, 900, 1133, 1172, 1387, 1965, etc.

tonomous, (b) his activities as free, (c) his rights acquired voluntarily and freely by an act of his will as inviolate.

(a) The will of the individual was autonomous. The rules of the Code, consequently, were to be only interpretative of, or supplementary to, the will of the parties, who might, as a general rule, break through them and replace them by any other legal rule they pleased. Their own intention constituting their law, it followed that they were to be held to the performance of their engagements with punctuality and good faith, according to the terms agreed upon and at any cost. Their property and even their person answered for their contracts. Upon these principles the legislator built up a whole group of theories regarding the compulsory performance of an obligation, damages, "vis major" or inevitable accident, mistake, default, composition of a bankrupt's creditors, etc.

(b) The activities of the individual were free. He might attain his end by any means he thought good, upon the sole condition of not injuring by his action the rights of others. Every right and every obligation arose in principle through the personal action of man, called contract, quasi-contract, tort, or quasi-tort. The law conferred a right or imposed an obligation only in exceptional circumstances. For this reason the individual was free to exercise his right or not; in general, he had even the power to renounce his right, save in the exceptional case where the law, out of social considerations, prohibited it; he could always exercise his right in the measure permitted him by law without the judge's ever being able, upon any ground whatsoever, to limit such exercise; if, in exercising his right, he caused injury to another, he owed no reparation and could continue without fear of molestation.

(c) Rights acquired voluntarily and freely were inviolate. This was the logical consequence of the two preceding principles. Such rights were perpetual and exclusive; their misuse was regarded no differently than their use. They could be transmitted "inter vivos" or by will, regardless of the economic result of such acts and however great the injury which society might suffer by them. Furthermore, one might not enrich himself at the expense of another; any one guilty of any act of this nature was bound to indemnify the injured party for the damage suffered.

The two great divisions of property law, ownership and inheritance, were regulated by the Code in accordance with its distinctly individualistic views:

The right of ownership was proclaimed as absolute, exclusive,

and perpetual. The legislator thought so little of the interests of society that he imposed neither limits nor conditions upon the acquisition of land. Any person might acquire land without having to prove aptitude or special capacity. He was absolute owner, that is, he could partition the land at will, and work it or not at his pleasure. He was the exclusive owner; none could acquire his title against his will, or effect a dismemberment of it, no matter how great the advantage that might accrue thereby to society. The Code provided, no doubt, for certain cases where general interest was to be preferred to private interests. Thus it established eminent domain, legal servitudes, compulsory partition, and so it prohibited trust-entails. But these were isolated cases. In general the Code drew its inspiration for the regulation of the right of ownership and the dismemberment of that right from private interest alone and not from public interest.

The law of inheritance, whether it was a question of administering the estate or of determining the lines of succession, was regulated also in view only of the interest of the individuals. The heir, by identification with the decedent, became liable for the latter's debts beyond the assets in the estate, as a further concession to the creditors of the estate. The decedent, save in the case where there existed an undisposable portion reserved by law for heirs, might dispose of all his property by will. If he died intestate his property went by law to relations, possibly of such a distant degree that the idea of family affection or presumed intention of the decedent could not suffice to explain it. The State benefited only in the last place.

(2) *Family Law* rested upon guiding principles quite different from those of the law of property. As in the case of property law, the Code perpetuated prior existing law. It repudiated, consequently, the doctrines of the philosophers of the 1700s, which, after having inspired the laws of the Revolution, quickly fell into discredit, in the period of codification.

Family law was based upon the idea of the solidarity of members of one and the same family by reason of the sentiments of affection uniting them. Individual interest here gave way before social interest. The same law, furthermore, established the principle of mutual assistance, of liability independent of the notion of culpability, and of the misuse of right, though the last was recognized only with important restrictions. It did not, therefore, treat the individual by himself, but as a member of a social group, the collective character of whose interests arose out of ties of

blood. It adopted as its basis the family, which it founded upon marriage.

Marriage, an exclusively civil contract, created between the parties a bond which could not be dissolved except for certain causes specifically enumerated by the law. It founded not alone the family, but also legitimate parentage and affiliation. Outside of marriage the family was unlawful; such a family was looked upon with disfavor by the legislator, who barely gave it a few provisions, believing that thereby he was acting in the interest of society. He recognized no family outside of the legal family.

All his provisions in this regard tended, among the members of a family, to tighten the bonds created by nature, morals, and social life. Between the members of the family standing in closest relationship, that is, between husband and wife and parents and children, he established a union of persons and of property, and over this union he placed a head: the father or the husband, to whom the other members of the family were united in relations of subordination. The whole body of relationships affecting a person and the members of his family constituted his civil status.

In the conjugal association, the wife owed obedience to her husband. And while the two could freely choose the matrimonial property system which was to govern their property, the law laid down that, in the absence of agreement to the contrary, the property of the two should be subject to the system of community. Now, this community was not an ordinary partnership. The husband not only managed the common property, but he acted toward third parties as its owner. The married woman lacked capacity: but, on the other hand, she was protected against her husband, whether such protection was accorded by the law in her own interests or in that of the family. In matrimonial property systems other than the "legal" or community one (*i.e.* presumed by law) the wife might enjoy more or less independence; but she was never the equal of her husband and could never dispose freely of her property.

In this family union as between father and children, the father was not limited to directing the education of his children and to the right of exercising his authority over them, but also managed their property and enjoyed the revenue. The powers of the father over the persons of his children were very broad; those over their property were less so, and even at death, he was met by a final limitation of his rights in the form of an undisposable portion

reserved to heirs, a final proof of the economic solidarity existing between him and his children.

Since family law rested upon these foundations, all the rights and obligations constituting it possessed an imperative character, whether the creation, exercise, or extinction of rights and obligations were concerned. In the law of property the intention of the individual was clearly declared sovereign by the legislator; in family law it played no more than a subordinate rôle. Seen from another angle of vision, family rights were also duties which might not be renounced. Rights and obligations were only modified when the basis upon which they rested came itself to be altered (as in case of the infidelity of one of the consorts, the misconduct of children). The legislator then himself regulated the new legal situation arising out of this new state of facts: he established divorce, separation of estates, disqualification to inherit, etc.

We should note also that the Code created duties based upon solidarity not only between parents and children, but between other relations, and these relationships produced effects more or less numerous according to the distance separating the two individuals so united. The closest degrees of relationship prevented marriage, and created legal guardianship, the duty of maintenance, intestate heirship and a right in the undisposable reserve of a testator's estate. In the collateral line relationship only conferred the right of intestate heirship.

§ 5. **Social Influence of the Codification.** — Resting upon the postulates and governed by the ideas which have just been sketched, the Napoleonic codification was followed, in France and in all the countries influenced by the Civil Code, by certain effects which it seems proper to note, for they have been too often left in obscurity.

The new Code had as a first result the disappearance of a legal system, incongruous and often confused, which was no longer in harmony with the new state of society created by the Revolution. In its place succeeded a new body of law, precise, clear, well co-ordinated, which, while borrowing from preceding sources, yet answered the new social needs. Furthermore, it contributed toward the popularization of law, and, in so doing, created a certain general state of intelligence hitherto unknown.

But, alongside these advantages, which have been diminishing with time, defects inherent in these very advantages made their appearance, and finally led to a veritable crisis in the problem of codified law. Codification (the truth is) opposed all evolution in law, by not attending to means of adjusting it to the practical

requirements of the future. As social life was nonetheless bound to pursue its own development, it necessarily was destined to come into conflict with codified law. Now it was the economic relations between individuals that underwent the most rapid evolution during the last century. And the Codes, having provided no means of adjusting the law, became for that reason an obstacle to complete economic development.

Writers and judges, far from seeking to remedy these defects, went on making them worse. They set out from these two ideas: that codification regulated the entire body of the legal relationships which it defined, and that the texts of the Codes were unalterable so long as they were not modified by other law. Therefore, it could not devolve upon the judges and the jurists either to moderate or to enlarge, much less create, juridical rules. This seemed to them the price of the security of legal relationships. Their conception of codification filled them with so exaggerated a respect for legal texts that it became a superstition.

On the very morrow of codification we find proof of this state of mind in the explanations made by Bigot de Préameneu to the Legislature on August 22, 1807, of the draft which was to become the law of September 3, 1807. Speaking on the proposal to change the title of Civil Code to Code Napoleon, he said: "This is a complete work; it is, if I may be allowed to use the expression, a sort of Holy Ark, and for it we will set for neighboring nations the example of a religious respect."¹ Napoleon himself felt this respect for the Code. We know his anger when the first commentary appeared. Even in exile, he regarded his legislative achievement as a hundred times more enduring than his military conquests. We know the celebrated remark attributed to him: "My glory is not to have won forty battles: Waterloo will destroy the memory of as many victories . . . , but what nothing will destroy, what will live eternally, is my Civil Code."² This respect for the legal text also affected the teaching of law. The law of 22 Ventose, year XII, required (Article 2) that the civil law be taught in the order of subject matter established by the Code.

(1) *Commentators*. — Imbued with this respect for the legal text, commentators of the Code not only did not see the transformations in society which required new legal regulation, but they believed that a law underwent no modification until corrected by

¹ *Loché*, "La législation civile, commerciale et criminelle de la France", Vol. I, p. 112.

² "Récit de la captivité", Vol. I, p. 401.

new enactment regulating the same matter. They did not admit that the law was capable of more or less perceptible transformation through the influence of changes affecting society. More than that, jural changes escaped them when they were manifested by new laws not expressly referring to the civil law. Thus they separated off and even created a systematic contrast between public law, notably administrative law, and private law, without perceiving that administrative law was for the greater part merely a new aspect of private law, whose principles it modified sometimes even more profoundly than many statutes expressly referring to them.

In their eyes the study of law, therefore, consisted essentially in a strict interpretation of legal texts, constituting a rigorous sequence of deductions, formulated without concern whether equity and social utility were satisfied. Their method was scholastic and logical rather than juridical. Commentators and judges did not need to know, they said, the transformations in social surroundings; they might criticize the defects of the law by pointing out the omissions of the legislator, but not by remedying them. They were to put aside social considerations, which have only a subjective value, and, wherever their logic was incapable of furnishing a solution, they were to be guided rather by the authority of the jurisconsults than by considerations of equity. Criticism of existing law, once incorporated into a text, was rather abstract than inspired by the requirements of practice, and jurisconsults, in their disdain for the observation of social facts, were far from having the acuteness and the penetration of the Roman lawyers, who, attentive to the least progress in social evolution, adjusted all the rules of law to its changes. Thus the interpreters nearly all limited their labors to a sterile commentary on the legal texts, without interest in the degree in which their rules were adapted to social necessity. And yet that is the whole purpose of law.

However exaggerated this worship of the legal text, social evolution was bound to force the interpreters of the law, even without their knowledge, to take account of facts; under the influence of facts, they were to render the law more flexible and extend its field of application. From the very first years following the promulgation of the Code, interpretation strove in vain to be merely expository. The legal text broadened constantly in proportion as other social needs made themselves felt. Argument by analogy and "a contrario" were accepted as methods of strict interpretation. In so doing the law was not in reality interpreted; it was stretched to

cover cases for which it had not been made. Thanks to their methods, which respected the letter of the law only in appearance, the interpreter widened its application or even created juridical rules, building upon the same principles which had guided the legislator in similar circumstances.

Under the pressure of ever more imperious necessities, jurists had to expand, little by little and even against their will, their system of interpretation. To the expository method succeeded a synthetic system of principles, which, without doing violence to the legal text, made it easier to render broader and more flexible and even to create the juridical rule more or less arbitrarily. Henceforth jurists regarded, not each article of the Code by itself, but the principles which the legislator followed in regulating each institution and which the interpreter inferred at need from the whole body of provisions governing the subject. The principles once laid down, the interpreter drew from them the consequences which they potentially held and applied them to cases not foreseen by the law. This was the favorite method introduced by Laurent, for whom the general principles constituted the whole law.¹

This system was in turn replaced by that of juridical synthesis, which marked a progress over the preceding method. Broad syntheses uncovered the general objectives controlling certain subjects; knowledge of these objectives permitted logical consequences to be drawn from them which the legislator himself had not perceived.²

(2) *Judicial Interpretation.* — The texts of the law inspired the same respect in the judge as in the author. He conceived it his duty to apply them with the utmost rigor. As an interpreter, he believed that his function was no longer the same as under the early law. He had to insure respect for the letter of the law, however unjust and unpractical the solution to which it led. His functions were thus mechanical: he constructed syllogisms whose major premise was the legal text and whose minor premise was the particular case before him. The conclusion followed naturally. Were it not so, he would have felt that there was no longer any separation between the legislative and the judicial powers and that he was in fact law making.

¹ *Laurent*, "Cours élémentaire de droit civil", Vol. I, pref., § 1; also *id.*, "Principes de droit civil", Vol. I, foreword and § 29; *Beudant*, "Cours de droit civil français" (Paris, 1896), pref., pp. vi and vii, and introd., pp. 1-3.

² For an excellent analysis of these methods, *cf.* *Gény*, "Méthode d'interprétation et sources en droit privé positif", §§ 8-30.

Such then, in the period following codification, was the conception which the judicial power held of its office, — a conception contrary, indeed, to that of the drafters of the Code, for they, as the report accompanying the draft and Article 4 prove, attributed no such subordinate rôle to the judge.¹

Thus, with the changing conditions of life, came an ever-increasing want of adjustment of the legal text to social needs. The judge could not fail to note this state of things. He therefore borrowed his system of interpretation from the legal writers, and thus succeeded, thanks to a certain subtlety of reasoning, in broadening the statute, in rendering it more flexible, and even in creating law. Thus it was that certain institutions came to be developed entirely by the courts, without even any point of support in the Code's text. We may cite as instances the law of life insurance and the inalienability of the marriage portion composed of movables. It even happened that the judges, more sensitive than the jurists to the necessity of satisfying social requirements, outstripped the latter and so drew away from their leadership. This explains the disagreement upon so many points between text-book and judicial decision.

The function of the judge, in the face of the codified text, was, therefore, not easy to fill. He could not entirely respect the letter of the law: social requirements rebelled; but neither might he adjust the legal rules to these needs: the formalistic nature of the texts prevented it. We here touch upon the crucial aspect of the problem which is the object of this study.

§ 6. **Influence of Codification upon the Philosophy of Private Law and upon General Juridical Science.** — The social influence of the Code Napoleon was thus considerable. And upon the ideas of law and justice, upon legal philosophy, and upon jural science in general, its influence has not been less.

After the codification, legal philosophy broke away from the social philosophy of the 1700s and returned to the idea of natural law of the philosophers of the 1600s.

(1) *Natural Law.* — Legal relationships were now not studied with regard to the changes which time and space produced in them, but as though derived from human nature and consequently always identical. Man was no longer looked upon as a being of temperament and tendencies of his own, obliged to live and suffer under the influences of a given social environment; he became an abstraction upon whom the ambient of life about him had no hold.

¹ Cassation, May 25, 1814; *Dalloz*, "Répertoire", under "Effets de commerce", § 237, note 1.

The method of studying natural law was, consequently, essentially rationalistic. Contrary to the philosophers of the 1700s, it neither gave consideration to the observation of society, nor to any well-determined ideal, but simply to the metaphysical speculations of the writers who devoted themselves to its study. Meanwhile the latter claimed that the rules which they elaborated independently of any observation, and which rested upon no foundation of reality, were derived from man's nature. According to them, the natural laws which they thought they were discovering, were universal and invariable; they reflected the absolute in morals, the absolute in justice, and positive law should emanate from them, whether it be a question of legislation or interpretation. This method condemned them to a spirit of routine. Far from furnishing, as they claimed, a rule for legislator and jurist, they, in reality, only steeped themselves in the essentially individualistic atmosphere of those classes and followed them. At first, indeed, they examined only the legal relationships expressly covered by the Code, and went so far as to follow the legislator in the order and exposition of the subject matter. Later they developed their theory of innate rights, accepting the middle-class property owner's point of view and contradicting their own conclusions. The right to live seemed innate, but not the right to work; they proclaimed liberty of conscience, but not the economic independence of the individual; they recognized in the ownership of land the same triple character embodied in the Code; and so on.

(2) *The Catholic Authors.* — Though a devotee of routine, legal philosophy was not wholly respectful of positive law. Upon certain points it was revolutionary. Of the philosophers, those who adhered to the Catholic dogmas should be distinguished from those who did not. The distinction is necessary, for the Catholic Church has itself defined several points of natural law, notably in relation to public law.¹ Catholic authors aligned themselves, therefore, with the interpretation given these matters by the Church; but so soon as a question arose upon points left unsettled by the Church, the controversies recommenced.² These writers not only denied the imprescriptible sovereignty of the people, since they claimed that power to be derived from God, but they also went so far as to affirm that such positive law as was contrary to divine law or such as was not inspired by the common good of those governed, could

¹ For a definition of these points, cf. *Vareilles-Sommères*, "Les principes fondamentaux du droit" (Paris, 1889), pp. 69, 267-272, 343-344.

² *Id.*, pref., § VII.

have no force. The individual not only had the right, but even at times the duty, to disobey it.¹

(3) *The Legal Philosophy of the 1800s.*—The French legal philosophy of the 1800s had neither the traits nor the useful results of the social philosophy of the 1700s. It was neither original nor idealistic in the true sense of that word; and it was hurtful.

It was not original, in that it was visibly influenced by the doctrines of the Code, by the civilian jurists of the prior era, and by the German philosophers of the 1700s, more, perhaps, than by the French philosophers of the same period. It was not idealistic, in that it did not aim to reshape legal relationships in agreement with the new principles derived from observation of the transformations in social life. Its point of departure was always individualism; and, setting out from this postulate, what it extolled as its ideal was a result of pure speculation, often contradicted by reality or the tendencies of society. It demanded, for instance, that paternal power be strengthened rather than relaxed, as modern laws were constantly doing under the irresistible impulse of society in that direction. It was hurtful, for, since it was not truly ideal, it served only to deceive the legislator and the jurist by continually placing before them as an ideal the old existing régime of individualism, fortified by theories that were inimical to social evolution. The philosophers imbued the minds of the jurists yet more profoundly with scholastic methods; they strengthened them in their love of logic, in their scorn of observation of social facts, and in their resistance to changes brought about by the life of society; for they pictured such transformations as mistakes which could be corrected by a strict enforcement of legal texts.

Summing up the general comparison between the influence of the philosophy of the 1700s and of that of the 1800s over the law and the lawyers, we see that the ideal of the philosophy of the 1700s was individualism, — a system contrary to that existing at the period and growing as much out of pure speculation as out of the political and social requirements of the time. But the philosophers of the 1800s proceeded in quite an opposite fashion; their ideal continued to be an antiquated régime, which had served its time; and their theories, which only aimed to bolster up that régime or to retouch it here and there, were inspired neither by pure reason nor by the requirements of political and social surroundings, but solely by empirical views concerning mankind.

¹ *Vareilles-Sommières*, "Les principes fondamentaux du droit" (Paris, 1889), p. 11.

(4) *The Popular Mind.* — Codification also exercised an influence upon the jurial mind in general. Jurists and philosophers tortured their conceptions of law, justice, and equity. Philosophy believed that these were three different ideas, and difficult indeed of attainment. Jurists found them opposed to one another, maintaining that there was no other law than that contained in the rules of the Code. Neither declared the three notions identical or viewed them at their true angle. They are, indeed, only the faithful image of the requirements of social life, and exist only to satisfy them; their rules are necessarily founded upon those needs.

Philosophers and jurists, furthermore, rooted in men's minds the individualistic theory which is at the bottom of the Code, and which they esteemed the embodiment of law and reason. Henceforth, in the life of the law, the only question was to be that of the rights and obligations of the individual; the notion of duty, as tempering right was, indeed, put forward by the philosophers, but it was absent from jurial life. The individualistic idea was so deeply anchored in the popular conscience that it was considered just to exercise a right recognized by law, even when the exercise of the right injured another or society. Thus the current expression "I have a right to do it," was often used as a final argument against any attempt to limit the exercise of some right which could not be absolute without harming general interests. In the same way, it was thought necessary to obey only the formal injunctions of the law. Thus men said: "I am not bound to do it" when it was a question of an act in which society might be in the highest degree interested, but which, nevertheless, the law did not command.

(5) *The Science of Law.* — Lastly, philosophers and jurists exercised an influence upon the science of law in general, each of them formulating a different, though equally abstract, idea of law. They came to believe that the study of law could exist only if based upon one of their conceptions. That was why (metaphysics and exegesis excepted) they neglected every other study, notably the history of legal institutions, and "a fortiori" the study of political science, which they held to have no relation to law. Legal science was thus manifestly in a position of inferiority as compared to the period prior to the codification, when jurists and philosophers, entertaining a broader conception of it, worked together to keep law abreast with ethics and justice and aided to make it attain a well-defined ideal.

CHAPTER II

DOMINANT LEGAL INFLUENCES OF THE SECOND HALF
OF THE CENTURYBY ALEXANDER ALVAREZ¹

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| <p>§ 1. The Civil Code as Judged by Public Opinion in the 1800 s.
 (1) Historians. (2) Legal Philosophers. (3) Sociological Philosophers. (4) Other Schools.</p> <p>§ 2. Attempts to Reform the Science of Private Law.
 (1) Charles Comte, Laboulaye, Courcelle-Seneuil. (2) Reforms of Method.</p> <p>§ 3. Renaissance in Legal Science.
 (1) German Legal Literature of the 1800 s. (2) Causes of Renaissance in Countries of Codification.</p> <p>§ 4. Modern Trends of Change in the Law.</p> <p>§ 5. Juridical Effects of Political Changes.</p> | <p>(1) Upon International Public Law. (2) Upon International Private Law. (3) Upon Internal Public Law.</p> <p>§ 6. Juridical Effects of Economic Changes.
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 (1) Upon the Relations of Husband and Wife. (2) Upon the Legal Relations of Parent and Child. (3) Upon the Illegitimate Child.</p> |
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§ 1. **The Civil Code as Judged by Public Opinion in the 1800 s.** — What appraisal and criticism did the French Civil Code receive during the 1800 s in point of substance and method? This is our next inquiry. There have been different verdicts, according to the science which the authors of such judgments have professed. We must distinguish according as we deal with economist, historian, philosopher, or jurist.

¹ [The present Chapter represents pp. 73-146 (with a few omissions) of the same author's "Une nouvelle conception des études juridiques et de la codification du droit civil" (Paris, 1904), from which the foregoing Chapter was taken.

The remainder of this work, setting forth the author's views upon the problems of legal method pressing for solution in the immediate future, is translated in "The Science of Legal Method", being Vol. IX of the Modern Legal Philosophy Series (Boston, 1917). — Ed.]

(1) *Historians*. — Historians made of the Code a living incarnation of Napoleon. They regarded it as almost exclusively his work; and their judgment has varied according to the sympathy which Napoleon inspired. Edgar Quinet, who saw clearly that a civil code is composed of “underlying principles, general rules, from which it derives its character”, was a great admirer of the draft presented by Cambacérès to the Convention in 1793; and admitted that its main general rules were adopted almost literally from the Code of the Convention into the Code of the year XII. In his eyes the Code of the Convention alone was truly original; the present Code was but a more or less successful expansion of it.¹ Other historians, on the other hand, were resolute champions of Napoleon and his work, for example, Thiers.²

(2) *Legal Philosophers*. — Among the philosophers, the jurists must be distinguished from the sociologists. We stated earlier that those who were concerned with the philosophy of law simply fell under the spell of French legislation, and rallied to the same system which inspired the text writers. With regard to the material treated by the Code, their criticisms of positive legislation were animated by speculations which swept away all considerations of social evolution. They made no effort to conform to its advance, but endeavored to react against it by recourse to legislation.

With the philosophers should also be numbered the theologians, who studied the Civil Code from the point of view of religion and the canon law.³ Their theory was the same as the philosophers', to whose influence they were subject and who in return came to feel theirs. They were, consequently (except for certain matters like civil marriage and divorce), influenced by the doctrines of the Code; it gave them pleasure to note the harmony between its precepts and those of theology.⁴

(3) *Sociological Philosophers*. — As to the sociological philosophers, their views were more radical. And the reason was simple. The social doctrines of the philosophers had in great part prepared the French Revolution. But in its turn the revolutionary influence had reacted upon the direction and nature of the social doctrines appearing later.

¹ “La Révolution” (ed. commemorative of 1789), Vol. II, bk. XV, § 11.

² “Histoire du Consulat et de l’Empire”, especially Vol. III, p. 344; Vol. XX, pp. 723–726.

³ *Goussier*, “Le Code civil commenté et expliqué dans ses rapports avec la théologie morale et le Droit canon” (1843); *Allègre*, “Le Code civil commenté à l’usage du clergé dans ses rapports avec la théologie morale, le Droit canon et l’économie politique” (Paris, 1888).

⁴ *Allègre*, *ibid.*, Vol. I, foreword, p. VII.

The first generation of the 1800s, that prior to 1830, genuinely believed that the Old Régime had crumbled in its entirety and that their task was either to restore it or to reconstitute society upon new foundations. That was the problem which all the philosophers of the period set themselves, being all agreed that society should be rebuilt.¹ Without in any degree pretending even to sketch the social philosophy of the 1800s in its relation to civil law, it will be enough to indicate, along their general lines, the legal conceptions of the sociologists who distinguished themselves more or less and who belonged to no well-defined school.

Their method of studying society was like that of the philosophers of the 1700s. It was the method of rationalistic and idealistic observation. They set out from an observation of past and present society and reached a well-defined idealism wherein the speculations of pure reason played no small rôle. This was especially true of the so-called theocratic school, several of whose members wrote at the end of the 1700s. Its disciples contended forcefully against the rationalism of the philosophers of the 1700s, though they set up one of their own. It was thus pervaded with their spirit, though combating them.² The same was true, but in a less degree, of the positivists, though Auguste Comte and his school claimed to make the observation of past society the distinguishing feature and the basis of sociology.

All the sociological philosophers of the 1800s had, nevertheless, one merit which cannot be too greatly praised: they struggled against that individualism, in the double sense of the word, which was consecrated in the Code; their idealism closely united law with morals, justice with equity. They made morals the true and ultimate science, and they demanded that the individual, before claiming his rights, should be filled with a sense of his duties towards humanity. All these ideas were set forth most clearly in the philosophy of Comte. The social doctrines of the philosophers of the 1800s dealing directly with codified law were those of the theocratic school of Saint-Simon, Auguste Comte, Fourier, and Proudhon.

The theocrats demanded a reaction against the political doctrines of the 1700s, and their theories came to a complete negation of individualism. Without aiming to show to what point their

¹ *Lévy-Bruhl*, "La philosophie d'Auguste Comte" (Paris, 1900), introd. § 1.

² *Henri Michel*, "L'idée de l'État" (Paris, 1896), bk. I, chap. 1, pp. 129-133.

doctrine was or was not a reaction against the philosophies of the 1700s, it is enough if we observe that Maistre in 1810 and Ballanche in 1818 looked upon statutory law fundamentally in the same way as did Rousseau. The difference was all in the form. For Rousseau, statutory law expressed the will of the people; for Maistre and Ballanche, it expressed the will of God.¹

Saint-Simon and Auguste Comte had, as we know, opinions which were closely related upon several points. Both professed a great disdain for law as up to then conceived, and perhaps a still greater disdain for jurists. They also combated the notion of individual liberty, opposing to it the liberty of social authority. As early as 1816 Saint-Simon made his challenge to law and jurists. Codes and jurists were the representatives of a past age of egoism. In his eyes, there was no law in the sense ordinarily attributed to the word. There was merely interest, properly understood, and he called for an "academy" that should be charged with drafting the "Code of Interests." Saint-Simon was equally severe with jurists. He remonstrated especially against their opinions when imbued with existing and traditional law, and against their inability to grasp social transformations and, consequently, the new bases upon which law ought thenceforth to rest. Their theories no longer corresponded with the needs of modern society. Jurists, moreover, exercised an injurious influence upon future legislation. They contented themselves with partial retouches of old laws when the then state of society demanded an entire remaking. And lastly, Saint-Simon put forth some exceedingly interesting ideas upon the right of property.²

Auguste Comte had himself the same distrust of law and lawyers. So predominant was the notion of duty in his system that he even denied the conception of law as accepted to-day. It seemed to him that the notion should disappear in a positive state of the universe, since it was metaphysical. The idea of law, he said, "is false as well as immoral, for it presupposes the absoluteness of the individual."³ Bold and revolutionary as were Comte's doctrines concerning law by themselves, he ceased to be original, it is worthy of remark, when he studied the family. Here, on the contrary, he

¹ For the political doctrine of the theocrats, cf. *Henri Michel, op. cit.*, bk. I, chap. 1, pp. 108-133.

² *Saint-Simon*, "L'industrie", in "Œuvres de Saint-Simon et d'Enfantin", Vol. XIX, pp. 218-249; "Vues sur la propriété et la législation" (ed. *Olinde Rodrigues*).

³ *Comte*, "Cours de philosophie positive", Vol. VI, p. 480. For the true effect of Comte's doctrine upon law, cf. *Lévy-Bruhl*, "La Philosophie d'Auguste Comte" (Paris, 1900), pp. 375-378.

was quite frankly under the influence of the conception embodied in the Code. Marriage, in his eyes, was one of the necessary bases of all society. He consequently opposed everything which tended to weaken marriage and to disorganize the family, and as a result society. Thus he came to condemn divorce. In the relationship of husband and wife he admitted the subordination of the wife to the husband, because he considered woman inferior to man from the intellectual point of view. He also demanded the strict subjection of the minor son to the father.¹ John Stuart Mill was of opposite opinion upon these last points, and that is one of the reasons why he broke with the positive philosophy of Comte.

Fourier and Proudhon were also occupied with the conception of law. The former founded the idea of law upon free association in his theory of the family; he went so far as to admit polygamy and free love.² Proudhon founded law upon the sentiment of human dignity. His views upon property are well known, as also the influence which they exercised.

(4) *Other Schools.* — It remains to note certain general doctrines which did not belong to any particular philosophy, but which by the greater or less success which they enjoyed exercised a real influence upon legal and social conceptions. These doctrines showed a double tendency. Some desired to confirm or simply modify the existing legal system; others desired a more or less radical reaction. The former were the liberal doctrines; the latter the democratic and socialist doctrines.

The distinctive feature of the liberal school, as also in the case of the theorists, was that it set up the individual in opposition to the State. This was contrary to the ideas of the philosophers of the 1700s, who not only did not admit this conflict, but, indeed, believed in the harmony of the two points of view. The logical consequence of this conception of the relations between the individual and the State was, we should emphasize, the perpetuation of all the inequalities existing in fact between men.³ Not only did this school take no stand against the body of legislation as a whole, but, on the contrary, it set it up more solidly, though tempering that individualism which was the basis of the Code. To this school should be assigned the orthodox economists. They set out from the same point of view: they opposed the individual

¹ Comte, *op. cit.*, Vol. IV, lesson 50.

² Fourier, "Théorie des quatre mouvements", pp. 147, 169, 192, 193; cf. "Œuvres complètes" (3d ed., 1846), Vol. I, pp. 110 *et seq.*, 125-126, 140-141.

³ Cf. Henri Michel, *op. cit.*, bk. III, chaps. I, II, III, VII.

to the State. The logical consequence of their doctrine and their influence upon legislation was the same as we have noted in the case of the liberal school.

The democratic school, in both politics and law, was moved by the sentiment of the interests of humanity. It believed that it fell to the State to interfere to bring equality and justice into social relations. From 1830 to 1848 it was not always easy to distinguish with precision between this and the socialist school. In their doctrines as in the men who professed them, they were singularly alike. They may be distinguished, however, by the fact that among the representatives of the democratic school some defended private ownership, like Tocqueville and Lamartine, while the other school, though admitting in principle the possibility and even the utility of social reform (as was true of Ledru-Rollin), was first and foremost interested in the political organization of society.¹

The rise of democracy wrought great changes, not only of a political but also of a legal nature, as we shall presently see. The spirit of democracy not only penetrated the opinions of writers and of courts; it marked especially the beginning of a new body of legislation, of a spirit and tendency quite opposed to those of the Code. We shall later sketch it in broad lines. Tocqueville had already presaged the influence which democracy would exercise upon law when he said that the aim of democratic legislation was more useful to humanity than that of aristocratic legislation.²

As to the socialistic school, its origins, divisions, the tendencies of each of its groups, its force of expansion among the popular masses, — all these are well enough known to make needless even a brief summary. Later we shall see its influence upon the new legislation.

Alongside the foregoing doctrines, which constituted a more or less powerful reaction against codified legislation, we must mention the individual efforts of a few economists which tended to modify certain points of the Code which they found deserving of criticism. It will suffice to name the best known among them. First, Pellegrino Rossi, of the classical school. He was first in France to draw attention to the inadequacy of the economic regulations contained in the Napoleonic Code. He declared in substance that the Code had appeared at the close of the social revolution, but not of the economic revolution, which, on the contrary, was to follow. Therefore, though the Code might have regulated rela-

¹ *Henri Michel, op. cit.*, bk. III, chap. III.

² *Tocqueville, "De la démocratie en Amérique"*, Vol. II, chap. VI.

tionships based upon the consequences of the former, it could not have known the results of the latter. There was, then, with blame to none, a deficiency in the law demanding satisfaction, a harmony to be reëstablished between private law and the economic conditions of the time. A bold but wise organization of industry, commerce, transportation, and credit was the complementary legislation which the then social conditions imperiously demanded. To attain this, it was enough, he thought, to adopt laws on special subjects which might be incorporated into the Code.¹

The works of Le Play should also be particularly mentioned, for they gave rise to a school. This economist claimed to combat the evils of society by restoring the authority of the father in the family and that of the employer in the shop. To this end he aimed to keep the family unity intact by conferring upon the father the right of disposing by will and by establishing the principle of the indivisibility of his land upon his death.

§ 2. **Attempts to Reform the Science of Private Law.** — The social transformations, the rise and development of new doctrines, the progress made in the political and social sciences and in methods of observation, exercised practically no influence upon the minds of jurists, any more, indeed, than upon juridical studies, during the 1800s. By their conception of codification and its principles, jurists were reduced to the part of mere interpreters; and this they have always esteemed their proper rôle since that period, until recently. When they criticized the law, they always did so from the point of view of the logic of its principles or from the point of view of natural law; they scarcely ever looked at the questions from a distance, or endeavored to take account of the new requirements made evident by the changes of social life.²

¹ *Rossi*, "Observations sur le Droit civil français considéré dans ses rapports avec l'état économique de la société", in "Revue de Législation et de Jurisprudence" (1840), Vol. XI, pp. 1-29.

² Exception should be made of *Bathie*, who criticized the Code and added concrete programs of reform in a series of articles, "Révision du Code Napoléon", which were the occasion of a great controversy with *Duverger*, in "Revue critique de Législation et de Jurisprudence", Vol. XXVIII, pp. 125-162, 308-364; Vol. XXIX, pp. 116-167; Vol. XXX, pp. 50-64, 128-148, 213-231, 322-346, 402-436. Cf. *Huc*, *ibid.*, Vol. XXX, pp. 346-364.

With *Bathie* should be cited *Émile Accolas*, who criticized the Napoleonic Code with great breadth of mind from two aspects. He first charged it with being a compilation without method, unity, or ideal; overcharged with detail and full of omissions; with being a compromise of contradictory principles, where the most contrary philosophical and political systems are met with, wherein not a single economic doctrine can be found; and finally as obstructive of the development of democracy. Cf. "Nécessité de refondre l'ensemble de nos Codes et notamment le

The study of the Code progressed only from the point of view of method, and that progress was largely due, as we said earlier, to the requirements of practice.

(1) *Charles Comte; Laboulaye; Courcelle-Seneuil.* — Certain jurists of authority, however, made efforts during the 1800s, to improve the science of law in general, and in particular the study of the Civil Code. And in recent years (hardly within our purview to describe) a genuine renaissance has taken place in this field. Among those who strove to improve legal science, especially that of the Code, during the first three-quarters of the 1800s, from another point of view than that of method, must be named Charles Comte, Laboulaye, and Courcelle-Seneuil. Each of the three acted under distinct influences: the progress of natural science through the method of observation, the progress of juridical study in Germany, and the progress of social science. None of the three was exclusively a jurist.

In 1826 Charles Comte, a jurist and publicist, impressed by the superiority of the method of observation in the physical sciences and by the defects of the deductive method in the study of the moral sciences, attempted to regenerate law by the method of observation and by its aid to discover the laws according to which nations prosper, decline, or remain stationary.¹ But his subject was sociological rather than legal. Comte was a forerunner of the sociologists, and his work, like that of other sociologists, lacked precision: it was too exclusively speculative to lead to any result in the science of law.

In 1839 Laboulaye drew attention to the very special stimulus that the juridical sciences were enjoying in Germany. The reason was, he said, that it had not been checked by codification as in France. From 1815 to 1830, while French juriconsults were absorbed in interpretative labors, Germany, animated by quite a different spirit, was giving herself wholly to historical studies, as notably in the case of Niebuhr and Savigny. Laboulaye severely criticized French legal instruction, which was purely exegetical; he styled it "illiberal, incomplete, behind the time", and credited

Code Napoléon au point de vue de l'idée démocratique" (2d ed., Paris, 1866), pp. 16-22. On the other hand *Troplong* had already praised the Napoleonic Code for its democratic spirit; cf. "De l'esprit démocratique dans le Code civil", in "Revue de Législation et de Jurisprudence" (1848), Vol. XXXII, pp. 128-166; (1850), Vol. XXXVII, pp. 321-346; Vol. XXXIII, pp. 181-206; Vol. XXXIX, pp. 1-27.

¹ *Charles Comte*, "Traité de législation ou exposition des lois générales suivant lesquelles les peuples prospèrent, dépérissent ou restent stationnaires" (Paris, 2d ed., 1835).

the professors of law with the erudition of logicians. He observed that, in spite of the efforts made in France to improve legal instruction, it was manifestly inferior to that obtaining in Germany. There was in France, he said, neither the movement nor the life to be found on the other side of the Rhine. He did not demand a radical change in the study of civil law, but a broadening of juridical study; he sought the introduction of instruction in the history and philosophy of law and in comparative legislation.¹

Courcelle-Seneuil, who was more an economist and sociologist than a lawyer, demanded that instruction be given in France in the general principles of the law, which were then studied only from the metaphysical point of view. He held the study of these principles to be indispensable, because they were, in a way, the basis upon which the whole law must rest. These principles must, in his opinion, be the results not of metaphysical speculation but of contemporaneous science. Speaking of the manner of interpreting legislation, he forcefully combated the narrow method of the jurists who looked solely at the letter and had no other care than to prove their point by logic, never seeking anything but the intention of the legislator. He charged them with finding pleasure in inventing new solutions derived only from the legal texts and not from a consideration of the requirements of life. Interpretation, he said, should be broader, less servile and more subject to the needs of practice.²

(2) *Reforms of Method*. — It was with the question of method, we said, that French jurists in their study of the Code were principally concerned. They wrote nothing, however, on this special subject.³ Only the ever growing demands of practice forced them to change their method by continually broadening it.

The German jurist Zachariae was an exception. Almost from the date of the appearance of the Napoleonic Code he produced a commentary on it in a form that was not exegetical but might

¹ *Laboulaye*, "De l'enseignement du droit en France et des réformes dont il a besoin" (Paris, 1839), introd.

² *Courcelle-Seneuil*, "Préparation à l'étude du droit. Étude des principes" (Paris, 1887), pref. and bk. III, chap. x.

³ In Italy several authors have given attention to this subject: *Tedeschi*, "Méthode dans l'étude du droit civil" (Turin, 1877); *Brini*, "Essai sur les institutions de droit civil italien", in "Archivio giuridico" (1881); *Gianturco*, "Les études de droit civil et la question de méthode en Italie", in "Filangieri" (1891); *Vadalà-Papale*, "Le Code italien et la science" (Naples, 1891); "Le droit civil dans l'enseignement universitaire", in "Archivio giuridico" (1882); *Salvioli*, "Méthode historique dans l'étude du droit civil italien" (Palermo, 1884); *Melucci*, "Méthode et questions du droit civil" (Turin, 1884); *Cuturi*, "Sur les discussions récentes sur la méthode dans l'étude du droit civil" (Bologna, 1887); *Asturato*, "La

rather be termed rational or scientific. With the aid of juridical syntheses, he set forth the material not in the order of the Napoleonic Code but according to a rational grouping of the ideas. In France, Aubry and Rau also produced a commentary on the French Code after Zachariae's method.¹ The superiority of the method made the celebrity of the work of Aubry and Rau, which, despite its age, is still regarded to-day as the best doctrinal exposition of the French Code. It is a curious thing that this method, in spite of its superiority, was not followed by jurists (with one exception to which we shall return later), either in their commentaries on the Code or in their instruction. Massé and Vergé even translated Zachariae's work, altering the method and restoring the order followed by the Napoleonic Code.²

Aside from the work of Aubry and Rau, all the jurists of the early 1800s wrote and taught the Civil Code according to the exegetical method. Duranton, who followed this method in the commentary which he wrote twenty years after the Code appeared, already recognized the importance of the study of the decisions of the courts in connection with that of legislation, and conceded it an important place in his work, though making no systematic study of it.³ The master of the exegetical method was Troplong. The work had its defects, but he was the first to introduce into the commentary of the legal text an historical element, in accordance with the doctrines of Guizot and Thierry.⁴

The dogmatic school, which came into being after the exegetical school, was distinguished from the latter in that it followed the order of the Titles of the Code, but not that of the Articles. Its most illustrious representative was Demolombe.⁵ The work of Laurent, whom we have already mentioned, marked a new progress

science du droit et le problème de sa méthode", in "Rivista scientifica del diritto", Vol. I, pp. 6 *et seq.*, 85 *et seq.*, 621 *et seq.*

For the question of the reform of instruction in civil law in Spain from the point of view of method, *cf.* the works of Posada, Azcárate, and Sanchez-Roman.

¹ *Aubry and Rau*, "Cours de droit civil français d'après la méthode de Zachariae."

² *Massé and Vergé*, "Le droit civil français; traduit de l'allemand sur la 5e édition, annoté et rétabli suivant l'ordre du Code Napoléon" (Paris, 1854).

[For a full account of the legal science of this period, see now *J. Bonniceuse*, "La science du droit privé en France au XIXe siècle, La Thémis (1819-31), et son fondateur Athanase Jourdan" (Paris, 1914). — *Ép.*]

³ *Duranton*, "Cours de droit français suivant le Code civil" (Paris, 1825), *pref.*

⁴ *Laboulaye*, *op. cit.*, *introd.*, § 9.

⁵ "Cours de Code civil."

in method. He attached the highest importance to the study of the general principles which govern each subject.

But, whether using exegesis, dogmatics, or governing principles, all these methods differed only in their way of arranging the material. At bottom they were identical in one respect: their absolute respect for the text, which served as point of departure for their developments, and the logic of their deduction, which was their sole means of solving legal problems.

But in the last quarter of the 1800s, an eminent professor of the University of Paris, Bufnoir, openly attacked all these methods of exposition and instruction, and effected a great step forward in the study of law. The method which he introduced in instruction was scientific, like that of Zachariae and Aubry and Rau, but improved by distinctive features. In his examination of the subjects under study he protested against the excess of logic used in the solutions up to then accepted, and, contrary to what had been customary, he for the first time constantly adjusted the law to the requirements of real life and always frankly recommended the solution which most conformed to the needs and tendencies of society. Consequently it has been rightly said that few jurisconsults of the 1800s exercised so great an influence as he upon the teaching of the science of law and upon the development of legal ideas.¹ And his influence was not merely in scientific regions; for it was he who secured the Ministerial Decree of 1895 which reformed and enlarged the curriculum of legal instruction in the Universities.

§ 3. **Renaissance in Legal Science.** — In order to explain this renaissance of the late 1800s in legal science in the countries of codification, notably France and Italy, we must cast a rapid glance over the development of the literature of the law in Germany during the 1800s, for it was partly this literature which contributed more or less directly to it.

(1) *German Legal Literature of the 1800s.* — Legal literature in Germany was particularly abundant during the 1800s, because the science of law was not arrested in its impulse, as in the countries of codification. Though certain of the regions of Germany possessed codes, their variety, and the absence of codification in other regions, prevented legal science from being confined to a mere sterile textual commentary. As early as the middle of the 1800s, Laboulaye (as above noted) drew attention to this fact,

¹ Guillaud, "Propriété et contrat", according to the lectures of Bufnoir (Paris, 1900), introd., pp. xvii-xxiv.

and made this discovery the basis of a demand for an expansion of legal studies in France.

The juridical studies that received a particularly important development in Germany were those relating to history, private law, general jurisprudence and methodology, and legal philosophy. We know that the historical school, headed by Savigny, owed its existence to the reaction against codification which set in in Germany in the early 1800s. This school enjoyed a wonderful development, especially in the study of the Roman law. It was the first to apply the method of observation to law and the social sciences, and it brought into discredit in Germany the old conception of a natural law.

Remarkable from certain points of view and evidently contributing to the progress of legal studies, this school, nevertheless, had its inadequacies and defects. In the first place, it disregarded the continuous evolution of law, and consequently failed to see that the real crux of the problem was not so much the fact itself of codification as its accomplishment upon bases which were an obstacle to its continuous adjustment to the requirements of social life. As a result, the school was without any legal ideal; it regarded such a notion as useless and even dangerous; it neither weighed nor judged events: it limited itself to ascertaining them, to explaining their cause, without occupying itself with their value either from the point of view of morals or of social interest. In this category of studies fall the works of Jhering. He protested vigorously in Germany against the dogmatism of the law and declared that to try to make out of jurisprudence a mathematics of law, in the name of logic, was to misconceive its essential nature.¹ His work on the Roman law, particularly his last works, exhibited a very different method from that of the exegetical school. He imparted a great impulse to ideas which led in Germany to a reawakening of legal science.

The literature upon subjects of private law was very abundant. Two branches of study existed in this field: the "*Pandektenrecht*" and the "*Deutsches Privatrecht*." In both, authors freed themselves from the legal texts.

General jurisprudence also produced a very abundant literature relative to each of the two conceptions which grew up upon this subject. Between 1840 and 1860 this class of study reached its height; since then it has declined.

¹ "*Esprit du droit romain*" (Fr. trans. by *Meulenaere*, 2d ed.), Vol. IV, § 69; and "*Études complémentaires de l'esprit du droit romain*" (Fr. trans. by *Meulenaere*, 1902), pp. 71-83 and 309-882.

The study of philosophy of law also prospered. Natural law, discredited by the historical school, was no longer accepted as a basis, but rather Schelling's conception, founded upon the concrete reality. The object was to explain the foundations of law and to study its historical forms. However, the method of observation was not employed; the point of departure was always an "a priori" principle. For this reason the principles of this philosophy were stamped with a middle-class, individualistic spirit, borrowed in large part from the positivism of contemporary legislation. These studies, as also those of general jurisprudence, fell into decadence in the last years of the 1800s, and their place was taken by studies of the general theory of law or legal dogmatics, which proposed to explain the general principles of law as observable by an analysis of positive law, made strictly according to the historical and positive method. This conception and method of study are those of the English analytical school.¹

(2) *Causes of Renascence in Countries of Codification.* — We may now see how the renascence of the study of law came about in the countries of codification. It was both scientific and practical by reason of the character of the causes which produced it. The causes of a scientific nature were the same that for years had induced certain authors to undertake the reform of legal study, namely: the progress of the natural sciences through the method of observation, the progress of the social sciences and of juridical study in Germany. The cause of a practical nature was the consciousness, ever more intense, of the inadequacy of codified legislation to satisfy the new requirements of social life.

The first of the scientific causes operated especially in Italy. The progress of the natural sciences exercised a determining influence upon the development of the school of criminal anthropology, which in turn reacted upon juridical science itself. A goodly number of jurists, imbued with the doctrines of the natural sciences and of the anthropological school, proposed to apply the Darwinian theory of evolution to the study of civil law and at the same time to infuse new life into it by the results of certain sciences, notably anthropology (psychology, psychiatry, legal medicine, and sociology). While certain of the works of this school were of great importance, its narrow viewpoint, that of finding in law an

¹ Cf. Korkounov, "Cours de théorie générale du droit" (Fr. trans., Tchernoff, Paris, 1903), introd., pp. 1-44 [Eng. trans. by Hastings, Philosophy of Law Series, Vol. IV]; Saleilles, "École historique et droit naturel d'après quelques ouvrages récents", in "Revue trimestrielle de droit civil" (1902), § 1, pp. 80-112.

evolution conforming to the laws of nature, prevented its producing anticipated results.¹

The second of the scientific causes operated both in Italy and France. Modern political economy broke down the principles of the liberal school; it approached to the reality of things and threw the light of a new day on many institutions of the law. Thus, attention has long been devoted to the close relation between private law and political economy;² furthermore, commercial law has been given a new life by study in relation to this science. In this field we may mention the names of Vivante, Marghieri, and especially Vidari³ in Italy, and of Lyon-Caen and Renault⁴ and Thaller⁵ in France.

In France, the scientific rebirth took on an official character since 1895, when a ministerial decree reformed the curriculum of the law schools in two particulars. In the first place, this decree gave a prominent place to instruction in the political and economical sciences, to which hitherto but a modest and altogether indifferent recognition had been given; it furthermore created, under the faculty of law, the degree of doctor in these subjects, which should serve as an objective in their study. This reform did not come about without opposition from those who regarded the Code as the basis of legal instruction and thought that the study of the political and economic sciences would be of no utility to the jurist.

¹ *Cogliolo*, "Essai sur l'évolution du droit privé. La théorie de l'évolution darwiniste dans le droit privé"; *Vadala-Papale*, "La nouvelle tendance du droit civil en Italie" (1883); *Cimbali*, "L'étude du droit civil dans les États modernes" (1881); "La nouvelle phase du droit civil"; *D'Aquanno*, "La genèse et l'évolution du droit civil; La réforme intégrale de la législation civile." In France, cf. *Manouvrier*, "L'anthropologie et le Droit", in "Revue Internationale de Sociologie" (1891), pp. 241-273, 351-370.

² In France the necessity of this alliance of the two sciences was recognized as early as 1849 by *Laboulaye*: cf. "Trente ans d'enseignement au Collège de France" (unpublished courses; Paris, 1888), pp. 27-40; *Rivet*, "Des rapports du droit et de la législation avec l'économie politique" (Paris, 1844); *A. Jourdan*, "Des rapports entre le droit et l'économie politique" (Paris, 1884); *A. Bechaur*, "Le droit et les faits économiques" (Paris, 1889); *Minghetti*, "Des rapports de l'économie publique avec la morale et le droit" (Florence, 1859; Fr. trans., *Leduc*, Paris, 1863). In September, 1885, the "Société d'Économie Politique" of Paris discussed the following question: "Is political economy distinct as a science from morals and law?" In this discussion *Léon Say* maintained that political economy ought not to be studied alone but in relation to morals and law. Cf. "Journal des Économistes" (September, 1886), p. 421.

³ *E. Vidari*, "Cours de Droit commercial" (Milan, 1893, 9 vols.).

⁴ *Lyon-Caen* and *Renault*, "Traité de Droit commercial" (4th ed., Paris, 1907).

⁵ *Thaller*, "Traité élémentaire de Droit commercial" (4th ed., 1910); ("Traité général théorique et pratique de Droit commercial", Paris, 1910; unfinished as yet. — TRANSL.).

In the second place, this decree no longer distributed the topics of law, during the three years of study required for the first law degree ("licencié"), by following the order of the Code, as had previously been done. It substituted an order of topics based upon juridical synthesis.¹

The renaissance in legal instruction is now fully accomplished. Its present progress and tendencies, under the leadership of Saleilles, and developed by Gény, Lambert, and many other distinguished names, are not within the present purpose to describe.²

§ 4. **Modern Trends of Change in the Law.** — It remains now to review, along broad lines, the principal social transformations and the degree in which they have modified and are tending to modify juridical institutions or the bases and governing ideas serving to support them.

The growth of democracy, the rise of the great industries, the increase of population in great centers, the expansion of man's activity, the progress of civilization and moral ideas, — such are these transformations, in general features. They in turn have produced others no less important: the multiplicity of relationships of all sorts between individuals, economic rivalry between nations and within each nation, solidarity of interests of wage earners, the struggle between classes, the growing expansion of the functions of the State, the development of the idea of association in all lines of activity, and the spread of social and moral doctrines which have led to a widening of the conception of justice.

To make clear the influence exercised by these various orders of phenomena upon juridical relationships, we shall divide them under three heads, political, economic, and doctrinal.

§ 5. **Juridical Effects of Political Changes.** — Political changes have influenced both the external and internal policies of nations.

The bases of international law at the time of the French Civil Code were the sovereignty and absolute independence of States towards each other. This was historically due to the isolation in which States lived. It permitted publicists, pervaded by the spirit of natural law, to give free rein to these theories. The ideas of independence and sovereignty were exaggerated to such a point that it was claimed that the application of a foreign law could be admitted within a State only by comity, without thought of obliga-

¹ For current opinion, cf. "Revue internationale de l'enseignement" (April 15, 1904), pp. 299-302.

² [A full account is given in "Modern French Legal Philosophy", being Vol. VII of the Modern Legal Philosophy Series (Boston, 1916). — Ed.]

tion thereunder. International policy was occupied solely with the maintenance of a European balance. It was indifferent to all that touched the material interests (which were, in fact, new) or the moral interests of a nation's subjects.

Increase of population, the progress of large-scale industry, of commerce and civilization, entirely changed international politics during the course of the 1800s, and consequently the principles underlying the relations between States.

To-day the material and moral interests of States have stepped beyond the boundaries of their own territory and are everywhere linked together. There are countries which have material and moral interests of no inconsiderable nature within the territory of other nations. This is the case of certain European powers in Asia, Africa, and Oceania; and for the United States in the countries lying within the Gulf of Mexico or bordering it. The increasing development of the interests of governments outside their own territory has produced in contemporaneous international politics two results in appearance contradictory. In the first place, there is the rise and growth of imperialism in all its phases; secondly, the regulation of certain interests by means of international conventions.

These conventions are of two sorts. Some propose to adopt uniform rules for the solution of conflicts of law. To this end conferences met in different cities of Europe in 1893, 1894, and 1900; they led to the signing of the Hague Conventions of November 14, 1896, upon several matters of civil procedure, and of June 12, 1902, upon marriage, divorce, separation, and the guardianship of minors. A successful effort in this direction was also made in Latin-America. The conference which met in Montevideo from August 25, 1888, to February 18, 1889, elaborated a draft of a code of uniform rules of private international law.

In other directions, the union of certain economic or social interests has been effected through conventions known as International Unions. This has been the case with the postal and telegraphic service, transportation, patents, trade-marks, and copyrights, hygiene and sanitary regulation. The number of such conventions tends to grow continually and to encompass every sort of subject, especially such as relate to social economy.

The consequences of such policies have been felt first in international law and later in all branches of law, especially private law.

(1) *Upon Public International Law.* — In public international law they changed the basis of the relations between States. In

fact, the imperialistic policy no longer admitted of absolute independence or even an equal independence or an equal sovereignty of all States. There is to-day a whole category of States whose independence or sovereignty has been more or less affected : neutral, partly-sovereign, vassal States ; States subject to protectorates more or less extensive, or to hegemony ; autonomous provinces, provinces belonging to one State and occupied and administered by other States, autonomous colonies, neutral zones, zones of influence, territories conceded upon long leases with sovereign powers, etc.

Imperialism, furthermore, especially in England and the United States, tends to regard as national and consequently subject to their protection certain areas hitherto considered international, notably straits and inter-oceanic canals.

Again, international unions, which at first limited their action to the establishment of uniform rules, have created international bureaus originally serving merely as centers of information ; but to which recent unions have conferred more and more extensive powers. One of the most recent, the Sugar Union, created by the Convention of Brussels of March 5, 1902, has set up over the contracting States a veritable international authority, invested with powers of its own and limiting thereby the internal sovereignty of each State upon the particular subject matter. These States have therefore abdicated their right to legislate freely in this field. The innovation is the more interesting in that it will certainly not constitute an isolated instance. On the contrary, this is the path we may predict international unions to follow in the future.¹

(2) *Upon Private International Law.* — The influence of the new politics and international relations was also very evident when it came to private international law (or conflict of laws). At the time of the adoption of the French Civil Code, this branch of science had no broader purpose than the settlement of conflicts between the law of two or more countries. Later, by reason of the closer relations of States and of the development of the idea of international brotherhood, the German school (Savigny, among others) assigned as the aim of private international law not the preference of one national law over another, but the search for a rule of conciliation between the positive law of the different coun-

¹ Cf. *Reault*, "Les unions internationales, leurs avantages et leurs inconvénients", in "Revue générale de droit international public" (1896), Vol. III, pp. 25 *et seq.*; *Politis*, "L'organisation de l'Union internationale des sucres", in "Revue de science et de législation financières" (Paris, Jan., Feb., March, 1904).

tries, of a system of rational combination assuring each law the degree of influence and the scope of application that should properly belong to it.¹ To-day, when the interdependence of States has become evident, and when juridical relationships, by their chaos and the effect of conventions of States, tend to become international, private international law must aim not only to combine the two conflicting legislations but to discover for the new class of relationships new rules conformable to their international nature. This will be a third aspect of this law. Its progress will lie in fixing rules based upon the observation of the evolution of juridical relationships in general, and upon a study of international conventions and of the findings of comparative law in particular.

International conventions create, in fact, in the subjects covered by them, a common and uniform rule for all the participating States. They are laws and must be observed as such in all the contracting countries. By transferring to the domain of international law questions which hitherto belonged exclusively to that of the legislation of each country, conventions have, in one stroke, modified the nature of each of the subjects so regulated. They may no longer be studied with regard simply to the regulation provided by distinct national legislations. They have an international aspect, and every conflict involving these subjects must be determined in agreement with the nature of this kind of relationship, and no longer merely according to the rules of private law.

It is our belief even that contracts of private law, merely by the fact that they affect international interests (as, for example, the construction of an interoceanic canal, of an inter-continental railroad, the procuring of immigration, or the laying of submarine cables), pass beyond the narrow limits of private law, and are to be regulated in accordance with their true character. No doubt the exegetical school of the French Code does not admit this view, but it will tend more and more to prevail. States do indeed seek to protect these undertakings beyond their own boundaries and some indeed enjoy an international protection incompatible with the nature of a rule of purely private law.

(3) *Upon Internal Public Law.* — The internal policies of every country have witnessed in our own period the rise and growth of democracy and universal suffrage. It is a fact of capital importance, because the people, by the simple fact that they govern

¹ Cf. *Pillet*, "Principes de droit international privé" (Paris-Grenoble, 1903), especially pt. I, chap. I, pp. 1-23.

themselves, tend to democratize all institutions and to solve all problems in the manner most conformable to their interests.

Collective interests, therefore, take precedence to-day everywhere over private interests. An entire branch of public law has originated and is steadily developing to satisfy this new desideratum. This is administrative law. Political entities in France, like the department and municipality, were created only in the general and collective interest to facilitate the functions of the public service. Governmental bodies and public bodies¹ have no other purpose than to satisfy special collective interests.

Administrative law proposes then to regulate harmoniously with general interests matters belonging more or less directly to private law. Take, for example, the right of property. The limitations imposed upon it directly or indirectly in the form of public servitudes have changed its nature and restricted its absolute character in the interests of the general good. This right, therefore, is becoming more and more an institution of public, rather than of exclusively private law. The change, not generally enough recognized, is one of the causes of what is known as the agrarian crisis. But this is not a phenomenon peculiar alone to the right of property. It has occurred more or less in all juridical institutions.

Administrative law narrows in a general way the field of application of the civil law, either by withdrawing certain matters from it or by changing the nature of others. In a word, the greater part of administrative law is in reality merely the material of civil law viewed from the standpoint of general interest rather than that of private interest.

This is a point which has not up to the present time been emphasized very clearly, because the idea, deeply rooted in all minds, has been tenaciously held to: that public law has a field of action quite apart from that of private law. It is admitted only that a relationship exists between the two sorts of law. Certain authors have already endeavored to show that these are closer than ordinarily believed. But far from conferring the character of public law upon institutions of private law, the jurists tend, on the contrary, to give predominance to the rules of private law over administrative law and to infuse them into the latter. Thus, for example, it is argued that an intimate correlation between the two branches is manifest in one of the fields of activity of the State,

¹[When associations have been thus "declared of public utility" by the government they are accorded the more special powers of a juridical person: Law July 1, 1901, Arts. 5 and 10. — TRANSL.]

that of governmental management ; and that activities of this sort, though emanating from the sovereign authority, should constitute a new form of business association and the rights of the citizens with respect to such acts should be controlled by the Civil Code.¹

But, though this theory is disputed, it is agreed that the variety of public activities form a progression, ranging from the exercise of sovereign authority to simple private ownership, — from acts belonging to public law properly speaking and governed by constitutional law to acts falling within the domain of private law and subject to the authority of the Civil Code or its legislative supplements, as modified by circumstances. It has even been claimed that administrative law has a twofold origin ; that it draws its basic principles now from constitutional law and now from civil law, so that it forms a link, as it were, between these two branches.²

In our belief the greater part of administrative law is, as we have already remarked, merely a new point of vision for the relationships of civil law. It is a new mode of regulating private relations, governing them solely from the point of view of social interest. As it develops, it will tend to break down more and more the distinction, heretofore so clearly marked, between public and private law, and to cause legal institutions henceforth to share in the character of both.

Administrative law has, then, modified certain institutions of private law, notably property. But as the nature of administrative law was regarded as different from that of private law, the changes in the course of the century have, through failure to realize this unity, not been clearly perceived.

It follows, that one who studies legal institutions solely as governed by the Civil Code, as is usual to-day, receives an incorrect conception of them. Their true character must be restored by assimilating public and private law ; and finally, when a question of private law arises involving also administrative law, preference should be given to the solutions reached by the latter, since it gives weight to general interests, which always tend to prevail over private interests.

§ 6. **Juridical Effects of Economic Changes.** — The great economic development of the 1800s shook and almost overthrew

¹ *Hauriou*, "La gestion administrative" (Paris, 1899), especially pp. 58 and 59.

² *Jacquelin*, "Une conception d'ensemble du droit administratif" (Paris, 1899), p. 27.

the entire political and economic organization of the past. It gave rise to formidable problems which cast their shadow over the whole field of contemporary politics, internal and external: problems of the industrial rivalry between nations or within a nation, of the massing of the forces of labor, and of class struggle; in a word, what is known as the social problem in its broadest sense.

International law, internal legislation, politics, philosophy, morals, literature, — all experience the influence of these phenomena and consequently of the sciences referring to them. Thus the political sciences have become social sciences, because, while maintaining the same objective, they no longer regard it from the political side as formerly, but from the social point of view. And thus the social problem to-day exceeds in importance those questions that remain purely political; politics themselves everywhere¹ are assuming a social character.²

Without endeavoring to trace the economic development of the 1800s³ and its expansion in every direction, we shall indicate the most striking features of this movement and its influences upon private law.

Economic changes have had a triple effect upon civil legislation. They have in the first place enlarged the field of operation of private law by breaking through existing legislative forms and creating a new legal system reposing upon new principles; secondly, they have destroyed the old unity of the law by originating in a considerable number of subjects a body of law quite special in character, concerning a great social class: the laborers; lastly, they have sown seed which, upon germinating, should evolve in a near future into changes yet more profound and radical.

Let us examine these points in turn.

(1) *Expansion of the Civil Law.* — We would first emphasize the great development of movable wealth. This has increased considerably through the growth of credit; through the increasing

¹ This is even so in the case of those nations where political questions involving nationality, liberty, or religion greatly excite public opinion, as in Austria-Hungary and the Balkans.

² Former political parties, such as liberals and conservatives, tend to become archaic. Liberalism has already accomplished its end and conservatism can no longer struggle to maintain institutions which have become antiquated by reason of the social transformations which have taken place. For that reason, events have modified the platforms of both parties. Neither indeed could hold to its early program without being an anti-social influence.

³ Cf. *Levasseur*, "Coup d'œil sur l'évolution des doctrines et des intérêts économiques en France", in "Revue économique internationale" (Brussels, 1904), § 1

number of stock companies, almost unknown at the time of the adoption of the Code; and through the commercialization of land. Though falling within commercial law, the rules governing these matters belong in reality to civil law and modify it more profoundly than is apparent at first sight, for they tend to cause the disappearance of the clear-cut distinction between movable and immovable property, which was at the basis of the Code, and to merge them, as it were, by giving each the advantages of the other.

Attention must also be drawn to what is called rural and industrial legislation, which is regarded as lying outside the Code, though in reality it regulates only relationships of a civil character. It, however, weighs the interests of agriculture or industry before those of individuals as isolated persons. If these laws did not exist, such relationships would be governed by the general rules of the civil law. They have, therefore, extended the field of operation of civil law, though they have broken through its old structure and become independent bodies of legislation. Again, we repeat, they are in reality but the relationships of civil law, though governed in accordance with the general interests of industry or agriculture instead of those of the individual. Hence the need of studying these relationships in their true light and of solving the problems to which they give rise, not according to the general rules of the Civil Code, but according to their own nature and the particular purpose intended by the new legislation.

(2) *Labor Legislation.*—The thousands of workmen, brought together in factories and bound by their similar interests, are animated by a single sentiment. They believe that by the present economic and legal organization they have been despoiled of what belongs to them or of what should belong to them. They have thrown themselves into the attack against the social conditions with the same ardor with which the Third Estate engaged in its struggle in the 1700s against the political privileges of a nobility. Their demands have given rise to a class struggle. Their complaints are voiced no longer individually but collectively, and emanate from individuals grouped into great unions; they have, too, an international character, for the same demands are heard in all countries with more or less intensity. The popular masses, everywhere kept in agitation, feel all the greater zeal thereby and create currents of public opinion formerly unknown and to-day irresistible. The political triumph of democracy, which has everywhere introduced universal suffrage, was the first great conquest in this direction. The right to form unions and the

right to strike have emancipated the workers as a social class. They have been enabled, by grouping their efforts, to become a political party and submit their demands and their grievances to the law-making bodies. By uniting the interests of its members, the laboring class has, furthermore, given rise to socialism, which goes on spreading and penetrating more and more our social fabric.

The law-maker scents the battle of the labor classes, who, in each new legislature, are more largely represented. He grants them partially at least satisfaction of their claims. On every hand numerous labor laws have already been voted and of these the more important refer to the labor contract. This legislation, born of the new social conditions, possesses characteristics quite opposed to the law contained in the Civil Code.

We have seen how the Code set out from a twofold individualism : its rules were inspired by private and not social interests ; individuals were considered in their relationships as though isolated from one another. The Code protected the interests of property-owners and abandoned the subject of obligations, including therein the labor contract, to the free play of individual action. The legislator to-day adopts a very different point of view. He considers the wage earner as having an interest bound up with that of all others exercising the same trade and he regulates their relationships to their employer in order to maintain stability between capital and labor. It is no longer a question of private interest, but, indeed, of social interest. Consequently the legislator does not leave the labor contract to free individual initiative, which leads to disastrous results ; he regulates it in order to protect the life, health, and working efficiency of the workman and to unite his interests to his employer's. This regulation is upon very different principles from that of other forms of contracts. The capacity of the contracting parties, the subject of the contract, its consideration, the rights and obligations to which it gives rise and its termination are regulated by special rules.

Not only the labor contract, but the entire body of labor legislation, rest upon a new principle which is opposed to individualism. The new principle is *solidarity* of interests, binding the workmen to each other and to their employer. The Law of December 27, 1892, upon conciliation and arbitration, expressly recognized this. This manner of solving conflicts was, moreover, of itself sufficient to prove the new basis. The foundation of labor legislation being no longer individualism, the will of the individual ceases to play the principal rôle ; rules of law are no longer interpretative or supple-

mental of the intention of the parties. They are mandatory. It is not permitted, consequently, to derogate from them by agreement; indeed, the legislator has even gone so far as to provide sanctions in the form of severe penalties in case they are transgressed.

So numerous are labor laws that they have almost everywhere been codified, even in England, where only partial codifications exist. In France, in 1901, the Minister of Commerce appointed a commission to unite into one code the various labor enactments. But it should be understood that these partial codifications are not codifications in the proper sense of the word, but simply a methodical classification of the laws upon the matter, and, in reality, we cannot, nor should we, go farther along this path.

It is generally believed that labor legislation is an independent branch distinct from the civil law and such certainly is the opinion of those who devote themselves especially to the study of these laws.¹ In reality it is not so. Just as administrative law is in fact, in its greater part, but a new phase of civil legislation taking into consideration solely the general interests; just as industrial and agricultural laws constitute a fresh evolution of that same civil legislation, taking into consideration the interests of industry and agriculture in preference to those of isolated individuals; so also labor legislation is merely civil law applied to a single class of persons, namely wage-earners, the controlling principle of which, in view of the object of the legislation, is the consolidation of the interests of the workmen with each other and their employers. The changes effected in civil law by labor legislation have not a general character, as in the case of administrative law. They apply only to the working class. The result is that alongside the civil law, formerly governing all private relationships, there now exists a body of legislation lacking systematic order and destroying in part the unity of the civil law by setting up beside the Code — whose “bourgeois” prejudices become the more marked thereby — a special legislation for wage earners. This doubling up of private law is one of the most remarkable phenomena of our time.²

¹ *Pic*, “*Traité élémentaire de législation industrielle*” (Paris, 1903, 2d ed.), pref., p. viii.

² It is not alone labor legislation which is exercising an influence upon juridical relationships. All labor institutions have an indirect, yet considerable, influence upon private law. For example, there is the family, the least subject to change, it would seem, among the institutions regulated by the Code. It has been profoundly transformed in its juridical and social functions by labor institutions. In a prior work we developed this idea at length: *Alvarez*, “*De l'influence des phénomènes politiques, économiques et sociaux sur l'organisation de la famille moderne*” (thesis, Univ. of Paris, 1899), pp. 56, 192-104, 162-215.

(3) *Other Future Effects.* — The economic transformations have had, as we have said, as their third and last effect to plant in civil legislation certain new seed which will reap in a near future changes yet more profound.

Labor legislation tends, in fact, to be made applicable not only to the industrially employed, who were at first the ones to be exclusively considered by the legislator, but also to all workers, howsoever employed, such as commercial employees, agricultural laborers, and even at times to small employers. It is easy to understand the importance of this new direction which legislation is taking.

There is also a tendency to regulate the labor contract uniformly in all countries, through international conventions, and consequently to withdraw it entirely from private law. This aim, deemed Utopian by the liberal school of economists,¹ is actually in process of realization, and has been taken up not only by certain unions, but also by international congresses. A conference was called to this end in Berlin in 1890, but it accomplished no practical results. Later was organized an association, "The International Union for the Legal Protection of Workingmen", the name of which sufficiently indicates its purpose.² Its aim has already become a reality. The Franco-Italian Convention of April 15, 1904, upon the subject marks in fact a new era in international relations and social legislation.

The labor contract tends, furthermore, to become collective. Trade unions strive, and often succeed, in substituting for separate contracts between employer and employee a collective contract between union and employer in a given industrial undertaking, or even in all undertakings involving the same industry.³

¹ *Paul Leroy-Beaulieu*, "L'État moderne et ses fonctions" (Paris, 1890), p. 350.

² Cf. *Pic*, *op. cit.*, §§ 172-183; to the bibliography cited in the preceding work add: *Politis*, "La Conférence de Berlin de 1890", in "Revue internationale de sociologie" (July-Aug., 1894); *Rolin-Jaquemyns*, "La Conférence de Berlin sur la législation du travail et le socialisme dans le droit international", in "Revue internationale de législation comparée", Vol. XXII, p. 5; *Yves Guyot*, "La Conférence de Berlin et la législation internationale du travail", in "Revue politique et parlementaire" (Dec., 1898); *Millerand*, "Les traités de travail: la réunion de Bâle", in "Revue politique et parlementaire" (October 10, 1903).

³ In England the Boilermakers' and Iron-Shipbuilders' Union has superposed, in the relationships between employer and employee, three distinct collective contracts one upon another. Cf. *Raynaud*, "Le contrat collectif de travail" (1901); *P. Boucour*, "Le fédéralisme économique" (1900); *Jay*, "Une réforme nouvelle d'organisation du travail par les groupements professionnels" (1901); *Bureau*, "Le contrat de travail, le rôle des syndicats professionnels" (1901).

We should also note the tendency of the legislator to grant to groups of laborers and groups of employers the right to lay down rules, obligatory upon all members of the same trade, for certain matters fixed by law, such as the maximum working day, the minimum wage, conditions of apprenticeship, etc.¹

It is needless to emphasize the decisive influence which the realizations of these four tendencies, each day gaining ground in the world of accomplished facts, will have upon civil legislation.

Finally, we would point out two other tendencies which also become each day more manifest and which in the end will effect a complete transformation of juridical relationships.

First is socialism (State and municipal), which aims to confer upon the State and municipality, in addition to their political functions, certain others of an economic order, and, consequently, to organize these functions. It aims to transform into public services a whole series of relationships which now fall within the sphere reserved to free, individual initiative, governed as such by the civil law.

The second tendency is the socialization of land-ownership, which is no longer regarded (as under the Civil Code) the subject of purely private right, but as a social duty. The agrarian question thus becomes daily more acute. This problem is not occupying all nations with equal intensity, but particularly those which, like Russia and Great Britain, are countries of large landholdings. During the last thirty years Great Britain has legislated upon this subject more than any other country, and, inspiring it all, has been the interest of society as a whole.

§ 7. **Juridical Effects of the New Social Doctrines.**— Certain social facts (and we call such all outside the domain of politics and economics) have also reacted upon juridical relationships. The increase of population, the growth of great cities, the expansion of human activities have contributed to bring individuals into closer union; men have emerged from their prior isolation to pursue in common the realization of identical interests.

Association or (Unionism) in its various forms has greatly developed during the 1800s and is the cornerstone of modern life. It has multiplied individual activities and cemented the interests of members of the same group. In its various forms it is not only national but tends even to become international. It exists in all

¹ Jay, "La protection légale des travailleurs" (Paris, 1904), pp. 209 *et seq.*

classes of society and in all orders of occupations: political, economic, industrial, scientific, literary, etc.

It is by associating themselves that individuals united, by common interests (farmers, merchants, manufacturers, consumers, tradesmen of every sort), make known their demands; and laws are tending more and more to safeguard the general interest of the group of which the individual forms a part.

Associations¹ (both commercial and non-commercial) have received from the law rights and powers which the individual could not enjoy. Certain laws go so far as to confer upon associations (or unions) rights in the nature of political power. These powers are exercised by the associations in the interest of their members, whose rights, instead of being individual, are socialized; for it is the group which exercises them, the individual enjoying them only through membership. By this means the second aspect of individualism above pointed out, by which individuals though related are considered as though living isolated, is tending to disappear. More and more the legislator inclines to regard individuals as associates, and by grouping their divergent individual interests, he creates among them co-ordinating ties of solidarity.

The development of group action and the powers that the group (or association) has received from the law have greatly influenced the juridical conception of its nature. That conception is still in process of change. Everywhere its true nature and character are being disputed, as also the nature and character of its property-holding powers; and new theories are being put forth in this regard which are destined to have a profound influence in the field of law.²

Other phenomena have also been at work upon juridical relationships. The development of certain doctrines which have arisen from the influence of political and economic changes, has had a reflex effect upon morals and consequently upon law. Like the facts to which they owe their rise, these new doctrines are in a transitional and critical state, and they mark the passage from the disappearing régime of individualism to a new régime, socialism, the ultimate nature of which we as yet know little. They combine various principles, even contradictory, borrowed in turn from individualism and socialism. We need no other examples than the

¹ [These two terms "société" and "association" cover all forms of association: the former is for profit and includes various forms governed by the Civil and Commercial Codes; the latter is not for profit, and is governed by its own special laws. — TRANSL.]

² *Vareilles-Sommères*, "Les personnes morales" (Paris, 1900).

doctrines of Le Play, Taine, Renan, Littré, Courcelle-Seneuil,¹ not to mention lesser names. A few authors have aspired to bring this period of conflict and transformation to an end;² but, needless to say, they have not succeeded. Among all these uncertainties, however, one thing is clear: the constant reaction throughout the 1800s against individualism, the principles and application of which were vigorously attacked by the theocrats as well as by the most recent scientific socialists.³

§ 8. **Solidarity.** — The new doctrines which have made their influence most felt upon moral standards, and consequently upon legal relationships, are socialism, solidarity, and democracy.

We have already said that morals include two spheres of action: the juridical, proper to the legislator, who there regulates legal relationships; and the private, remaining outside legislative influence. We have also pointed out how the ethical basis of law, accepted by the legislator, was that of the philosophy of the 1700s, which laid as its foundation the absolute respect for individual rights and wholly neglected the idea of solidarity. Private morals were the doctrines of Christianity, with fraternity as the basis of the relationships between individuals.

During the 1800s socialism and solidarity entirely overturned this state of things, and, in legal relationships, proposed to substitute for the ethics of individualism the Christian morality, which assumed then the name of solidarity.

These doctrines inspired not only the new economics and recent legislation but also legal practice and decisions; they have transformed those conceptions of juridical liberty (and as a consequence those of civil liability), of moral justice, and of public policy, which play an important part in the Code.

A first consequence of this idea of solidarity was the rise of a science the object of which was to restrain the excesses of individualism in political economy. This science was social economy, whose humanitarian aim was to diminish the suffering of mankind and to increase its well-being, in the measure that such increase might contribute to social peace. Modern laws are no longer inspired, as was the Code, by tradition, or the rationalistic principles

¹ For a summary of these doctrines and a confirmation of these ideas, cf. *Henri Michel*, "L'idée de l'État" (Paris, 1896), bk. V, chap. 1. Upon the diversity and confusion of economic doctrines, cf. *Pic*, "Traité élémentaire de législation industrielle" (2d ed., Paris, 1902), §§ 17-69.

² For example, *Faüllée* and *Renourier*. Upon their doctrines and a critical appreciation of their ideas, cf. *Henri Michel*, *op. cit.*, bk. V, chap. III.

³ *Henri Michel*, *ibid.*, bks. I-IV and conclusion, § 1.

of the philosophers, or the individualism of the economists, for whom the entire sum of justice consisted solely in giving to each what is believed to belong to him, — in other words, in establishing the relations of co-existing individuals. They are now inspired by a new principle of justice, solidarity. It dominates economics and social morals; it presupposes coördinated relationships opposing the individual.

(1) *Practical Applications.* — Solidarity manifests itself in the new legislation in the following ways:

(a) Provisions are enacted with a view to the regulation of certain general interests whose influence is felt more or less directly upon legal relationships (administrative law).

(b) Legal relationships are regulated from the point of view of general interests, and these now prevail over the particular benefit of individuals.

(c) Certain classes of legal relationships, especially those affecting the laboring class, are no longer left to free individual initiative. The legislator is moved solely by general interests in the provisions which he adopts in their regard.

(d) The new legislation establishes the principle of assistance due by certain individuals to others who have need of it, especially by employers to their employees and by the State towards certain interests of the workingman.

(e) They tend to limit the exercise of certain rights and to impose certain liabilities even where no physical injury is done; in other words, they endeavor to introduce the principle of the misuse of rights and to extend the principle of civil liability.

(f) They multiply occasions for the increasing interference of the State, in order to assist association in its various manifestations and to recognize the public usefulness of bodies which the principle of association has not yet brought into existence.

(2) *Theory of Liability and Culpability.* — We have already pointed out that the idea of solidarity modified in legal practice and decisions the conception of juridical liberty and consequently that of civil liability.

The Code admitted that the individual had the right to act as he pleased, to enjoy (as he believed) a proper use of his rights, as limited precisely by the rights of others. It was only in case he overstepped those limits that the individual could be held responsible and even then only for the actual damage caused. Indemnity for mental and other non-corporal damage was not allowed or even dreamed of. Furthermore, the individual's act was considered

psychologically free. He had therefore not only to be held civilly liable but also to pay for all injurious acts which he committed. This double conception of individual liberty resulted in *narrowing civil liability* and, on the other hand, in *extending criminal liability*.

To-day the idea of solidarity, and the progress achieved in psychology and psychiatry, have completely revolutionized the conception of liberty from these two points of view. Civil liability has enormously increased, and criminal liability has in turn been limited.

The latter limitation has come about because jurists, with the results of these sciences (and also public sentiment) before them, have been more and more convinced that the criminal is not morally culpable, and that he has acted as a result of more or less apparent forces. The problem of crime is, then, not the punishment of the guilty for an act for which he was never wholly responsible, but his redemption by appropriate means.¹

Civil liability has increased from three points of view.

In the first place, legal writers and judges tend more and more to refuse to recognize individual rights as absolute. They tend to substitute for the old maxim of the Code, that there can be no reparation where there has been only the exercise of a right, the idea of the "misuse of rights", bringing upon the author of the injury a liability independent of his legal culpability. More and more is it coming to be admitted that acquired rights may not be turned aside from their normal uses, and that whoever, even within the limits established by law, exercises his right with an evil intention or causes it to deviate from the social or economic purpose which justifies it, must lose its enjoyment or be condemned to repair the injury caused. And if it is a question of a right arising out of contract, it may be destroyed by the annulment of the contract or brought within its normal limits by the court.²

Secondly, the courts are punishing with increasing strictness the liability arising out of an injurious act. In the early years of the Code pecuniary compensation for mental and other non-corporal injury caused by a wrongful act was not recognized either by jurists or courts. Yet both allow to-day that such a case gives rise to civil damages. The courts, however, hesitate to establish the

¹ This explains the fact, at first appearance strange, that the popular conscience, while having a strong sense of legal liability, has, on the other hand, a much feebler sense of responsibility to God. Cf. *Abbé de Gibergues*, "Nos responsabilités" (Paris, 1901), pp. 1-20.

² *Sabatie*, "De la déclaration de volonté", Art. 138, §§ 85 *et seq.*; "Théorie de l'obligation" (2d ed.), p. 343, § 4; and p. 370, § 1; *Porcherot*, "De l'abus du droit" (thesis, Univ. of Dijon, 1901); *Charmont*, "L'abus du droit", in "Revue trimestrielle de droit civil" (1902), no. 1, pp. 113-125.

principle of pecuniary reparation for this kind of injury when it results from the non-performance or the violation of a contract. But jurists already assert that civil liability should be admitted in this last case; and perhaps the principle will not be long in becoming definitely accepted.¹

Finally, both authors and judges have admitted that there may be liability independent of any idea of culpability, as, for example, in the case of accidents to workmen. This innovation was justified upon the legal theory of objective liability or occupational risk. Legislation later explicitly established this liability of the employer to his workmen. It rests in reality upon the principle of assistance due by the former to the latter; it is merely the realization of the principle of solidarity.

(3) *Equity, Moral Justice and Public Policy.*—The changes which the notions of “equity”, “moral justice”, and “public policy” have undergone in practice and in judicial interpretation are also the legal effects of the idea of solidarity. These terms as employed by the legislators are vague, and they will constantly evolve in conformity with ideas and doctrines of the times. The legal notion of Equity and moral justice was, at the time of the Code, very narrow; that of public policy also had a narrow reach, and was merged with the notion of public law. To-day this is no longer true. The basis of morals being solidarity, writers and courts tend, timidly though each day more boldly, to consider as contrary to equity and moral justice everything contrary to the idea of social solidarity. The same is true of the notion of public policy, which tends constantly to be identified with the notion of general interests.

The evolution through which these two conceptions have passed, and which is far from being terminated, will enable authors and courts to solve numerous problems smoothly and in harmony with the requirements of life.

§ 9. **Legal Effects of Democracy.**—If the idea of solidarity has exercised a notable influence upon legal relationships, as shown by legislation, literature, and judicial decisions, this is also true of another ideal, that of democracy. Its influence has been especially felt in *family law*.

We said above that the original Code made a clear-cut distinction between the lawful and unlawful family, and that it built up the law governing the former upon the basis of aristocratic and

¹ *Dorville*, “De l'intérêt moral dans les obligations” (thesis, Univ. of Paris, 1901).

autoeratic solidarity. The advent of democracy has tended to a complete overthrow of the distinction between the two sorts of families recognized by the Code, as well as to the weakening of the legal ties of, and authority exercised within, the lawful family. In a democracy men differ little from one another. As Tocqueville very justly remarked, each day the understanding of what constitutes superiority becomes feebler and dimmer. In vain the legislator endeavors to place him who obeys beneath him who commands; custom each day confuses the two and draws them insensibly to the same level.¹

(1) *Upon the Relations of Husband and Wife.* — The legal relations of husband and wife have been transformed by the influence of this doctrine. The so-called feminist movement is merely the operation of this new idea. The authority of the husband as the head of the family and manager of the community property has been tempered more and more in the wife's interests. The legal bonds which unite them by associating their persons and property, tend constantly to relax. From the point of view of the association of their persons, we find the wife's duty of obedience to her husband weakening, and a tendency arising to regard marriage as a bond which may be dissolved more and more easily by divorce. As to the association of their property, the tendency is to enlarge the participation by the wife in the management of the community and even to effect a more or less complete separation of the respective estates of the two.

The growth in the wife's independence destroys not only the authority of the husband but also the solidarity of the relationship. We must, however, note, as an exception to this impairment, the movement of all modern legislations to give to the surviving spouse consort greater and greater rights over the deceased's estate. In spite of this exception, the rapid progress of socialistic ideas, still very uncertain in this matter,² makes it probable that in the near future the legal relationship between husband and wife will be reduced almost to non-existence. There is no reason, however, to fear for the future of the family, which, in reality, is not based upon legal ties, as generally believed, but upon bonds of morality and of affection.³

¹ *Tocqueville*, "De la Démocratie en Amérique", Vol. III, pt. 3, chap. VIII.

² For the different socialistic systems upon this point, cf. *Menger*, "L'État socialiste" (Fr. trans., Paris, 1904), bk. II, chap. XII, pp. 176-192.

³ Upon the constant impairment of the legal ties between husband and wife, cf. *Álvarez*, "De l'influence des phénomènes politiques, économiques

(2) *Upon the Legal Relations of Parent and Child.* — The democratic idea has also exercised a two-fold influence upon the legal relationships between the father and his legitimate children. On the one hand, it has weakened his authority; on the other hand, it has imposed upon him, as corollaries to his rights, duties involving his liability. He may no longer, as at the date of the Code, exercise his rights freely and without control. To-day it is no longer admitted that the father is invested with a purely individualistic function, but rather, indeed, with a true social obligation, in the discharge of which the progress of the entire nation is concerned. As such, the obligation cannot be abandoned to the father's pleasure; he may be deprived of his power if he shows himself unworthy to exercise it. As in the case between husband and wife, socialistic ideas tend to cause a radical change in the legal relations between the father and his children.¹ But these transformations cannot have a destructive influence upon the family. Here, again, it is less a matter of legal ties than of morals and affection, inherent in human nature and strong enough to insure forever the existence of the family.²

(3) *Upon the Illegitimate Child.* — Lastly, the democratic idea has exercised an influence upon family law by constantly improving the condition of the illegitimate child; and this without giving heed, as did the legislator of 1804, to the disadvantages which might result to the lawful family. The effort has been to better the situation of the natural child in two ways: first, by enlarging the right to investigate his paternity, and secondly, by assimilating his situation to that of the legitimate child. The movement, it will be seen, is a return towards the principles of the Revolutionary legislation, against which the Code had reacted. It is worthy of remark, that it was in the name of social interest that the Code refused to natural children the same right as to legitimate children. To-day it is in the name of the same interests that they are being placed upon an equal footing before the law.

Democracy has, then, had two apparently contradictory consequences upon the family. On the one hand, it has gradually loosened the legal ties uniting the members of the lawful family; on the other hand, it has rapidly improved and tightened those ties between members of the natural family. There are thus two

et sociaux sur l'organisation de la famille moderne", chaps. II and III, pp. 60-83.

¹ *Menger, op. cit.*, bk. II, chap. XIII, pp. 193-200.

² *Cf. Alvarez, op. cit.*, chaps. IV, v, pp. 84-138.

families socially and legally organized, whereas at the time of the Code there was but one. This slackening of the juridical ties of the lawful family and their extension to the natural family is the prime point upon which hangs every problem relating to the family in modern society.¹

¹ Cf. *Álvarez, op. cit.*, chap. vi, pp. 139-161.

CHAPTER III

CHANGES OF PRINCIPLE IN THE FIELD OF LIBERTY,
CONTRACT, LIABILITY, AND PROPERTY¹

- I. SUBJECTIVE RIGHT AND SOCIAL FUNCTION; THE OLD AND THE NEW THEORIES.
- II. THE NEW CONCEPTION OF LIBERTY; SUNDRY APPLICATIONS.
- III. THE NEW CONCEPTION OF LIBERTY (CONTINUED): ARTIFICIAL PERSONALITY, AND ASSOCIATIONS.
- IV. THE NEW CONCEPTION OF THE JURIDICAL ACT: CONTRACTS AND TESTAMENTS.
- V. THE NEW CONCEPTION OF LIABILITY FOR INJURIOUS ACTS.
- VI. THE NEW CONCEPTION OF PROPERTY.

SUBJECTIVE RIGHT AND SOCIAL FUNCTION ; THE OLD AND THE
NEW THEORIES

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| <p>§ 1. Scope of the Subject.</p> <p>§ 2. Continuity of the Development of Law; Principal Stages.</p> <p>§ 3. "Declaration of the Rights of Man" of 1789; the Napoleonic Code.</p> <p>§ 4. The Legal System established by them is Metaphysical and Individualistic.</p> <p>§ 5. This System is being sup-</p> | <p>planted by a Realistic and Social System of Law.</p> <p>§ 6. The Idea of Social Function.</p> <p>§ 7. Solidarity or Social Interdependence, and the Rule of Law.</p> <p>§ 8. Division of Labor in Society.</p> <p>§ 9. Essentials of the Individualistic System of the "Declaration of the Rights of Man", and the Napoleonic Code.</p> |
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§ 1. **Scope of the Subject.** — The object of these inquiries is to examine the general changes which have taken place in law, especially in private law, in American and European countries since

¹[This Chapter represents LÉON DUGUIT's "Les Transformations générales du droit privé depuis le Code Napoléon" (1912, Paris, Félix Alcan). The original text was a literal publication of a course of lectures delivered by the author at the Law School in Buenos Aires in August and September, 1911, on the invitation of that University.

The author is professor in the Faculty of Law of Bordeaux, and one of the greatest modern French thinkers. A full account of his work is given in Mr. Spencer's Editorial Preface to Vol. IX of the Modern Legal Philosophy Series, "Modern French Legal Philosophy" (Boston, 1916). — Ed.]

the beginning of the 1800s, and particularly since two celebrated events which mark an important stage and occupy a notable place in the history of civilized nations: the "Declaration of the Rights of Man" of 1789, and the Napoleonic Code.

Our inquiry will be pursued from a purely scientific point of view, without preconceived opinion, or prejudice arising out of any political or religious doctrines, — rather, indeed, with a deep respect for all beliefs. Personally I admit of no dogma in any line of belief whatsoever; I follow the guide of science, and science only, based upon an impartial observation of facts.

Let us understand at the outset the meaning and scope of our subject. My purpose is not to indicate the changes which legislation has actually effected in the principal countries of Europe and America. That would be a task both difficult and of no great interest. Besides, I am of those who think that law is much less the work of the legislator than the constant and spontaneous product of events. That statutes and codes continue to exist without amendment of their rigid texts is of little consequence. By the nature of things and the force of events and practical needs new legal conceptions are constantly forming. The text of the statute survives, but it has come to be without force or life; or, by a learned and subtle interpretation, it is given a meaning and application which the legislator never dreamed when he drafted it.

Without, therefore, taking up modern enactments in detail, I shall examine the general transformations of law, and particularly of private law, since the "Declaration of the Rights of Man" and the Napoleonic Code, in countries where legislation still consists of rules inspired by the principles established by these two instruments. And it is fair to say that, while there are differences in detail and in the wording of legal texts, all American and European countries have reached the same degree of civilization, — at any rate all countries of Latin origin.

§ 2. **Continuity of the Development of Law; Principal Stages.** — But if the law is in a state of perpetual transformation, if new legal conceptions are continually in process of development, why limit the period of observation? Why take the "Declaration of the Rights of Man" of 1789 and the Napoleonic Code as points of departure?

Undoubtedly there is in reality an unbroken and perpetual transformation of ideas. We must, nevertheless, for the sake of facilitating the development of our subject, fix limits and distinguish periods. Artificial the distinction certainly is; but it is,

nevertheless, indispensable. However, I do believe that in the general evolution of nations, there exist certain periods which begin and end with great events and which cannot escape the attention of the observant student. In my opinion it would be a great sociological error to ignore this fact. It is, therefore, necessary to mark off these periods and to chart the great currents of civilization, which appear during each of them.

§ 3. **The "Declaration of the Rights of Man"; the Napoleonic Code.** — It seems to me impossible to doubt that, for nations of American and European culture, the Napoleonic Code and the "Declaration of the Rights of Man" of 1789 mark the close of a long period of legal evolution, the completion of a juridical temple, certainly not lacking in grandeur and strength. The statesmen of 1789 and the drafters of the Napoleonic Code, and, it must be added, the great majority of French and foreign jurists of the first half of the 1800s, with the exception of Savigny's school, believed that law was an exact system, commanding adherence with the same rigor and unassailable logic as a system of geometry. Just as modern geometry rests upon the propositions formulated by Euclid, so at all times and in all nations the law of civilized communities could, they thought, be but the normal and rational development of the indestructible and final principles that had been formulated in those two instruments.

Hardly had the edifice been completed when it became evident that points of weakness appeared. The 1800s have been a particularly fruitful period in all lines of human activity. A very considerable movement took place in social effort. But instead of constituting what the statesmen of the French Revolution and the first generation of the last century believed to be the normal development of the principles formulated in 1789, this movement marked a serious reaction against them. During the last hundred years the work of destruction has gone on; it is still in process. But with the 1900s there appeared clear lineaments of a new legal structure. Yet, this in its turn cannot be final. Nothing final exists in the world. Everything passes away, everything changes; the system of law now in process of growth will one day give place to another, which the sociological jurist of the future will have to define.

The disappearance of the legal conceptions established by the "Declaration of the Rights of Man" and the Napoleonic Code, and the growth of new conceptions, are not peculiar to France. It may be that these movements have advanced farther there

than elsewhere ; it may be that the frame of the new legal structure is nearer completion there than in other countries. I cannot say. But the transformation is general. It is apparent in all the nations that have reached a like degree of civilization, in Europe as well as America. It may be nearer realization in one place than another ; here it is apparent in one matter, there it makes itself known in another. But its character is general and presents the same distinctive marks in all European and American countries. It makes itself felt in the whole field of law, public as well as private ; though I intend to examine it particularly in the domain of private law.

§ 4. **Their Legal System a Metaphysical and Individualistic One.** — The general characteristics of this profound transformation of legal doctrine can, I believe, be formulated in two broad propositions :

(1) The "Declaration of the Rights of Man", the Napoleonic Code and all modern codes which have to a greater or less extent been inspired by these two instruments, repose upon a purely individualistic conception of law. To-day a legal system is developing that is based upon an essentially *social* conception.¹ It is of course clear that the word social is used for want of better, and that it implies no adherence to any socialistic political party ; it simply expresses the opposition between a system of law founded upon the idea of a body of subjective rights residing in the individual and a system based upon the idea of a rule of civic conduct obligatory upon the individual.

(2) The system of law established by the "Declaration of the Rights of Man" and the Napoleonic Code rests upon the metaphysical conception of subjective right. But law to-day tends to find its foundation in the knowledge of the existence of social function, incumbent upon individuals and groups. The individualistic system of law was metaphysical ; the new system which is being worked out is realistic.

Let me explain. I said that the fundamental notion underlying the system of 1789 and 1804,² and of all the legislation inspired by it, is that of subjective right : the subjective right of the State, as

¹ Cf. Charmont, "La socialisation du droit", in "Revue de métaphysique et de morale" (1903), p. 403 ; A. Mater, "Le socialisme juridique", in "Revue socialiste" (1904), Vol. XL, pp. 9 *et seq.* ; Duquêt, "Le droit social, le droit individuel, et la transformation de l'État" (2d ed., 1911, Paris, F. Alcan).

² [The date of the Napoleonic Code, now generally known as the Code Civil. — TRANSL.]

the personification of the community; the subjective right of the individual. This conception is purely metaphysical, and is, therefore, bound to be antagonistic to the tendencies of modern nations and to the realism, or, frankly, the positivism of our times.

What is "subjective right"? The endless controversies that arise over the true nature of subjective right are the best measure of the artificiality and fragility of the conception. A volume might be filled merely with the titles of all that has been written in Germany, France, and Italy, and also in the Argentine Republic, upon the nature of subjective right. In the end all this discussion comes to define subjective right as the power residing in a person's will to impose his purpose as such upon one or more other wills, so long as he intends something which is not prohibited by law. The Germans, notably Professor Jellinek, have said that subjective right is a power to exercise the will, or the power to impose obedience to one's will upon others.¹

¹For the various definitions of subjective right and the discussions which have arisen upon the matter, cf. *Duguit*, "Traité de droit constitutionnel" (1911), Vol. I, pp. 1 *et seq.*; *A. Lévi*, "La société et l'ordre juridique" (1911), pp. 245 *et seq.*, chapter entitled: "Le côté objectif et le côté subjectif du droit"; *Demogue*, "Les notions fondamentales du droit privé" (1911), pp. 325 *et seq.*; *Michoud*, in "La théorie de la personnalité morale" (1906), Vol. I, rejected the conception of subjective right as it has been given in the text. He preferred to answer the unsolvable problem of the juridical personality enjoyed by a group of persons, by adopting with slight modification *Jhering's* celebrated definition: "Rights are interests protected by law." Cf. "Esprit du droit romain" (French ed., 1878), Vol. IV, p. 326. *Michoud* wrote: "For a right to exist, there must be a direct and immediate protection. We define subjective right, therefore, as: the interest possessed by a person or group of persons, and legally protected through the power recognized in the will to represent and to defend that interest" (p. 105). But in any case, *Michoud*, in the end, necessarily regards subjective right as a power of will. Indeed, supposing the foundation of subjective right to be solely interest, the right itself would only be evidenced in reality when the interest was declared externally by a voluntary manifestation on the part of the possessor of the right or another person. Here again subjective right is in the end nothing more than a power to will. Furthermore, *Michoud* clearly recognizes that it is the person himself, possessor of the right, who asserts his interest or who *imposes* his interest. In the passage cited he says that it is not necessary "that this will belong in a metaphysical sense to the possessor of the right as his own, but that it suffices that this will may be predicated of him by society or in practice." And on page 132 he writes: "When a medium of expression exists, it is the juridical entity itself speaking; its voice is not something detached from the legal entity; it is a part of it. Juridical organization, one result of which is the medium of expression, is of the essence of legal personality." There is not doubt, therefore, in *Michoud's* mind that it is the will itself of the juridical entity which puts the interest in action; and a right is, then, simply an interest set in action by the will of the possessor of that interest; in other words it is the *power to will* of the possessor. It will be seen later (Appendix I) that *Michoud* denies emphatically that he is a metaphysician. Can he maintain his denial when, in the passages cited, he declares that it is not necessary "that this will belong in a metaphysical sense to the possessor of the right as his own,"

So, in the case of my generally admitted rights, those that are most familiar, it will be easily seen that in practice they are in fact the expressions of my power to impose my will, even forcibly, upon others. Liberty, for instance, is a right. It is my power to enjoin upon others respect for my will to develop without restraint my physical, intellectual, and moral forces. I have the right of property: it is my power to enjoin upon others respect for my will to employ as I choose the thing that I possess as owner. I have a right "in personam": it is my power to force upon a person my desire that he perform an act.

The idea of subjective right then, — and this must not be lost sight of — always implies two wills face to face with one another: one will which can enjoin the other; one will superior to the other. This implies a hierarchy of wills, in a sense a measuring of intentions; it imports a postulate about the nature and the force of the element of will. Now that is an assertion in the highest degree metaphysical. We may, indeed, observe the external manifestations of the human will. But what is the nature of the human will? What is its force? Can a will of itself be superior to another will? These are not questions that can be solved by positive science.

For the same reason the conception of subjective right falls entirely to the ground. It can be truthfully said that such a metaphysical conception cannot be maintained in an age of realism and positivism such as our own. The great philosopher Auguste Comte declared this truth more than a half century ago, when he so forcefully said: "The word *right* must be shelved from an exact vocabulary of political thought, just as the word *cause* from an exact vocabulary of philosophy. Of these two theologico-metaphysical conceptions, one, that of right, is immoral and anarchical, while the other, that of cause, is irrational and sophistical. A true right cannot exist except in so far as constituted authority emanates from supernatural will. To contend against this theocratic authority, the philosophy of the last five centuries introduced the so-called rights of man, which supplied simply a negative need. When the attempt was made to give them a truly affirmative rôle, they soon manifested their anti-social nature by their constant tendency to set up the individual. In any positive state of existence which does not admit of the divine origin of authority, the

and that "Juridical organization, one result of which is the medium of expression, is of the *essence* of the legal personality?" Are not these statements in the highest degree metaphysical?

conception of right disappears forever. Each one has duties toward the individual and towards all, but no one possesses a right in the strict sense. In other words, no one possesses any right save that of always doing his duty."¹

Yet it is upon this artificial and obsolete conception of subjective right that the "Declaration of the Rights of Man" of 1789, the Napoleonic Code, and the greater part of modern legislation have founded their systems of law! How familiar are the words: "Men are born and remain free and equal as to their rights. These rights are liberty, property . . ."²; "Property is the right of enjoying an object in the most absolute manner possible."³

Taking Argentine legislation as an example, we find that Chapter I of the Constitution is entitled: "Declarations, Rights, and Guaranties;" Article 14 provides that: "All the inhabitants of the nation shall enjoy the rights hereinafter set forth, upon conforming to the law regulating their exercise;" Article 2506 of the Civil Code⁴ defines ownership as: "the right over a thing by virtue of which it is absolutely subjected to the will and the acts of a person."

To this metaphysical notion of subjective right was joined a purely individualistic conception of society and of objective law, that is to say, of law prescribed as a rule of conduct upon individuals and upon the community as an entity, that is, upon the State as a person.

Individualism has had a long history; it has been the product of a very long evolution. It took its origin in the Stoic philosophy and found its juridical expression in the classical period of Roman law. By the 1500s and the 1700s it reached a complete and final form, which may be summarized in this way: Man in nature is free, independent, isolated, the possessor of inherent rights that he may not alienate or lose. These rights are known as natural rights and are inseparably attached to him as man. Society arose by the voluntary and intentional coming together of individuals

¹ *Auguste Comte*, "Système de politique positive" (ed. 1890), Vol. I, p. 361.

² "Declaration of the Rights of Man" of 1789, Arts. 1 and 2.

³ Napoleonic Code, Art. 544.

⁴ The Argentine Civil Code was drafted during the years 1868 to 1870 by the eminent Argentine jurist Dalmacio Vélez-Sarsfield, born in Córdoba, Argentine Republic in 1810. Vélez-Sarsfield was a man of great talent and of profound legal and economic preparation for the work (he had taught political economy at the University of Buenos Aires). His draft was approved by Parliament and became law Jan. 1, 1871. Since that date it has undergone three or four modifications, some of which were foreseen and prepared by the framer himself. (Note supplied by Dr. Dellepiane, Professor in the Law School of the University of Buenos Aires.)

for the purpose of assuring protection to their individual and natural rights. No doubt, as a result of this association, limitations were placed upon the rights of each, but only in the measure necessary to assure to all the free exercise of their rights. Organized society, the State, has but one purpose, to protect and legalize the inherent rights of each person. A rule of law, that is to say, objective law, rests upon the subjective right of the individual. The rule of law lays upon the State the duty of protecting and guaranteeing the rights of the individual; it forbids the State to enact laws or perform acts interfering with the exercise of these rights. It lays upon each individual the duty of respecting the rights of others. The limitations to each person's activity rest upon and are measured by the protection granted to the rights of all. We read in Article 4 of the "Declaration of the Rights of Man" that: "Liberty consists in being allowed to do all that does not injure another: thus the exercise of the natural rights of each person has no other limits save such as assure to other members of society the enjoyment of those same rights. These limits may only be fixed by law." Article 5 declares that: "Law may only prohibit acts that are injurious to society;" and Section 3 of Title I of the French Constitution of 1791 says that: "The legislative power may enact no laws which impair or interfere with the exercise of natural and civil rights. . . ."

§ 5. **This System supplanted by a Realistic and Social System of Law.** — This purely individualistic conception of law was as artificial as the metaphysical conception of subjective right. Like the latter, it was a product of history. There was a time when it performed real service; but it could not endure.

In the first place it was woven with the idea of subjective right; and if this, as has been shown, is a metaphysical conception which cannot be maintained in modern society, saturated as it is with realism and positivism, the individualistic conception of law must also fall.

But the individualistic theory, even standing alone, cannot be sustained. The idea of man in a state of nature, isolated, independent, having as man rights antedating the existence of society and bringing those rights with him into the community, is absolutely erroneous. Man, isolated and independent, is a pure fiction; he never existed in such a state. Man is a social being; he can only live in groups; he has always lived as a member of a group.

And finally, to speak of the rights of man when isolated in a state

of nature, to speak of the individual considered by himself and separate from his fellow beings, is to fall into a contradiction "in adjecto." By any definition, every right implies a relation between two subjects. If man is examined isolated and wholly cut off from his fellow beings, he has no rights and can have none. Robinson Crusoe on his island had no rights; he could have none until he entered into relationship with other beings. The individual, therefore, can have rights only so long as he lives in society and only by reason of the fact that he lives in society. To speak of rights prior to the existence of society is to speak of the impossible. And as we have already shown that man as a member of society can in reality have no subjective rights, the entire system of law based upon the conception of subjective right and the individualistic doctrine crumbles, destroyed by its own false premises.

Meanwhile, in all American and European countries that have reached a like state of culture and civilization, a new system of law founded upon other premises is being evolved. It has reached a stage more or less advanced according to the country. Slowly, under the pressure of facts, it is replacing the old system, and the substitution is going on independently of the legislator, indeed, in spite of his silence and, at times, of his unfriendly intervention.

The new system rests upon a purely realistic idea which is gradually crowding out the metaphysical conception of subjective right: that idea is *social function*.

The individual has no rights; neither has a group of individuals. But each member of society has a certain function to perform, a certain task to fulfil. It is precisely this that underlies the rule of law which is prescribed upon everyone, great and small, the governing and the governed. This is also properly a realistic and social conception, and it is radically transforming all the old doctrines of law. Before developing this thought, let me give two examples to illustrate in a concrete manner how the transformation is being accomplished and in what it consists. The examples are liberty and property.

In the individualistic system, liberty is defined as a right to do all that does not injure another, and hence, "a fortiori", the right to do nothing. The modern notion of liberty is no longer this. To-day each person is considered as having a social function to fulfil and therefore as under a social duty to perform his function. He is under a duty to develop to the greatest possible extent his physical, intellectual, and moral personality in order to perform his function most effectively, and no one may interfere with this free

development. But man may not remain inactive, he may not be an obstacle in the way of the free development of his own personality; he has no right to inaction, to idleness. The government may intervene to force him to labor; it may even regulate his labor, for in so doing it merely forces him to perform the social function which devolves upon him.

As to property, it is no longer in modern law regarded as an unassailable and absolute right over one's wealth. The right of property exists and must exist. It is the indispensable condition upon which rests the prosperity and greatness of society; collectivism would be a return to barbarism. But property is not a right; it is a social function. The owner, that is to say the possessor of wealth, by the fact of his possession, has a social function to perform. So long as he fulfils his mission, his acts as owner are protected. If he does not perform his function or performs it ill; if, for example, he leaves his land uncultivated or allows his house to fall into ruin, the intervention of the State is justifiable to oblige him to perform his social function as a property holder. Such intervention consists of procuring at the hands of the owner the employment of his wealth, according to its nature.

Such are the fundamental ideas which will direct our line of thought.

§ 6. **The Idea of Social Function.** — I have shown that the individualistic system of law must necessarily disappear among modern nations. The idea of subjective right is metaphysical and cannot survive the present period. The individualistic conception contradicts itself. The system of law constituted on this dual basis was due to special circumstances,—was indeed but a transitory product of history which at a given period answered a social need, but whose period of supremacy has now closed. I stated further that in all modern countries a new system of law is evolving, founded upon a purely realistic social conception: that of social function.

What, then, is this idea of social function? Simply that neither one man nor groups of men possess rights. When we speak of the rights of the individual or of society, when we say that the rights of the individual must be reconciled with those of the community, we speak of something that does not exist. However, each individual has a certain function to perform in society, a certain task to fulfil. He cannot be permitted not to fulfil his function or his task because his failure to do so would derange or at least injure society. Furthermore, all his acts contrary to the function which

devolves upon him will be restrained by society; but all his acts done to further the mission which is his by reason of his position in the community, will be protected and guaranteed by society.

Herein appears very clearly the social basis for a specific rule of law or for objective law. It is both realistic and social: realistic, in that it rests upon the fact of social function observed and proved at first hand; social, in that it rests upon the essentials themselves of social life. Specific rules of law, as they are imposed upon men, are not founded upon respect for, and protection of, individual rights that do not exist, nor upon manifestations of individual will, which, of itself, can produce no effect upon society. Rather do they rest upon the very foundation of the social structure, the necessity of preserving a cohesion between the different elements that compose society through the accomplishment of the social function which devolves upon each individual and group of individuals. It is truly, then, a social conception of law which is supplanting the traditional individualistic conception.

§ 7. **Solidarity, or Social Interdependence, and the Rule of Law.** — The elements entering into social cohesion seem to me to have been very definitely determined by various sociologists.¹ It is not necessary to dwell upon them at length. They are found in what is called *social solidarity*, a word that has by its abuse been the cause of much confusion. Public men have made it their own and diverted it from its true meaning. I prefer, therefore, to use the term *social interdependence*.

Social solidarity or interdependence, as I understand the term and believe it ought to be accepted scientifically, is not a sentiment, much less a doctrine; it is not even a principle of conduct. It is an existing *fact*, capable of direct proof: it is the fact of the social structure itself. Observation and analysis show that, independent of the degree of civilization of a particular people, solidarity or social interdependence is composed of two elements, ever recurring in varying proportions and forms, co-mingled, yet each preserving essentially the same character at all times and in all races. These two elements are: similarity of needs of the persons forming a single social group; and, diversity of needs and talents of the persons forming that same group.

Men belonging to the same group are linked to one another, first, because of their common needs, which they can satisfy only by a life in common. This is solidarity or interdependence by reason of similarity of interests. But men are also united because

¹ Notably *Durkheim*.

they have different needs and at the same time different talents, and because, living together, they are enabled thereby to render mutual services and procure the satisfaction of their various needs. This is solidarity or social interdependence by reason of the division of labor.¹

§ 8. **Division of Labor in Society.** — Solidarity by reason of the division of labor is the fundamental element which brings about social cohesion in our highly civilized modern communities. Civilization itself has come to be measured by the multiplicity of individual needs and of the means of satisfying them in the shortest possible time. This implies a very complete division of labor and also a very far-reaching division of the functions of individuals, and consequently a very great inequality between men to-day.

The division of social labor is the paramount fact of our time; it is the pivotal point, as it were, upon which the law of to-day is revolving. Each individual, each group of individuals, whether the supreme dictator of a nation or its humblest subject, whether an all-powerful executive or parliament or a modest association, has a certain task to perform in that vast workshop composing the social body. This task or function is determined by the position which the individual or group in fact occupies in a community. The individual possesses no subjective rights; he can possess none, because a right is an abstraction without reality. But, by the mere fact that he is a member of a social group he is under an obligation, existing in fact, to accomplish a certain social function; his acts performed with this aim have a social value and will be protected by organized society.

Such was Auguste Comte's meaning when he wrote: "In other words, no one any longer possesses any right save that of always doing his duty." Individuals possess no rights; those who govern possess no rights; no social group whatsoever possesses rights. Instead we find a social function to perform and protection afforded all acts done in view of that function; but only these acts are protected and only in the measure in which they aim to satisfy the function.

§ 9. **Essentials of the Individualistic System.** — It is easy to perceive how profound a transformation the conception of social function implies in an individualistic and metaphysical system,

¹ *Durkheim*, "La division du travail social" (1893, 2d ed. 1903; Paris, F. Alcan); *Duguît*, "L'État, le droit objectif et la loi positive" (1901), pp. 23 *et seq.*

such as constitute the "Declaration of the Rights of Man", the Napoleonic Code, and the greater part of modern legislation. All the elements composing the individualistic system are in process of transformation. The names designating the different divisions of the law survive, and will survive for a long time to come; but in reality they connote something quite different.

What were the primary elements composing the individualistic system of law? Their transformation in a realistic and social sense must now be described.

Leaving aside the organization of the family (because it is a special study which cannot be undertaken here, for many reasons, but particularly because its evolution has been along lines typical of each people), the primary elements constituting the individualistic system of law are four:

(a) The principle of individual *liberty*. This is formulated by Articles 2 and 4, of the "Declaration of the Rights of Man" of 1789¹ and in the Argentine Republic by Article 14 of the Constitution.¹

Liberty implies, as will be shown presently, the autonomy of the individual will, as established by Articles 6 and 1134 of the Napoleonic Code and by Articles 19, 30, and 944 of the Argentine Civil Code. The autonomy of the individual will is the right to exercise one's volition juridically; it is the right to create by an act of the will and under certain conditions a state of facts having legal consequences.

(b) The *contract*. In the individualistic system this is the perfect type of juridical act.

Theoretically, a state of facts producing a legal result can arise in the relations of two individuals only through contract, unless, as an exception, it be expressly created by law. This is logical. A fresh state of facts means an alteration in the juridical status or sphere of action of two persons, positive for the actor and negative for the person acted upon. But the foundation and measure of the juridical sphere of action of each person is the will of the person himself. His sphere of juridical action cannot then, in principle, be affected except by his own will. Consequently, a juridical act which is a relation between two individuals, subjects of right, can arise only through the concurrence of the wills of those two subjects. We shall here see later what remains to-day of this theory, which, like all the theories of the individualistic system, is undergoing a profound change.

¹Quoted *supra*, § 4.

(c) The third essential element of the individualistic system is the principle of individual *liability* for an injurious act.

Every act done by a person without right and occasioning injury to another person entails an obligation upon the originator of the act to repair the damage. The act must exceed the right possessed by its author; in a word there must be wrong on his part. This is the principle of liability for wrong or subjective liability, which is of such capital importance in the individualistic system. It is exclusive of all other grounds of liability in that it did not and could not admit of any other basis. It was formulated in these words in Article 1382 of the Napoleonic Code: "Any act by which a person causes damage to another binds the person, by whose fault the damage occurred, to repair such damage;" this provision is elaborated in the Articles that follow it. Article 1109 of the Argentine Civil Code may be likened to it: "Every person performing an act which, by his fault or negligence, occasions damage to another, is bound to repair the damage." We shall here show that alongside of subjective liability for wrong there is coming into existence an objective liability for risk which is directly due to the social conception of law.

(d) The principle of the inviolability of *property*, understood as the absolute right to use, enjoy and dispose of a thing.

This principle is laid down by Article 17 of the "Declaration of the Rights of Man" which provides that: "Property being a sacred and inviolable right, no one can be deprived of it. . . ." The substance of Article 17 of the Argentine Constitution is identical: "Property is inviolable; and no inhabitant of the nation may be deprived thereof except by a judgment in accordance with the law." I have already quoted Article 544¹ of the Napoleonic Code which defines the right of property; its prototype is Article 2506 of the Argentine Civil Code: "Property is that right over a thing by which it becomes subject to the will and acts of a person." Private ownership as a right is the fundamental element of the entire individualistic system; and it may be justly said that the Napoleonic Code was a Code of property Rights. For it must be substituted the Code of Work.

¹ *Supra*, § 4.

II. THE NEW CONCEPTION OF LIBERTY; SUNDRY APPLICATIONS

§ 10. Transformation of the Con- ception of Liberty.	§ 12. Its Application under Modern Statutes relating to Work- men and Pensions.
§ 11. Principal Consequences of this Definition.	

§ 10. **Transformation of the Conception of Liberty.** — The first and most general element of the individualistic system is the right of liberty. The word has a very comprehensive sense. It embraces at once what we know as political liberty and what we call civil liberty. The former is the right recognized in every subject of a nation to participate in a certain measure in the government of the country; with liberty so understood I am here not concerned. I propose to consider only civil liberty, a definition of which is given in Article 4 of the “Declaration of the Rights of Man:” “Liberty consists in being allowed to do all that does not injure another . . . ;” and in Article 14 of the Argentine Constitution. Liberty is thus regarded as the subjective right of man living in society. It is the right to act; it is the right to develop one’s physical, intellectual, and moral forces. But it is more than that. It is also the right to will with juridical effect. It is the right of being able, by an exercise of the will and subject to certain conditions, to create a state of facts productive of a legal result. It is what we shall call the autonomy of the will.

Liberty having been regarded as a subjective right of the individual and only as a right, the consequences that followed are clear. Man has the right to develop freely his physical, intellectual, and moral forces. The State or legislator can do nothing to infringe this right. But they may and should enact laws regulating the exercise of freedom of the person and freedom of thought, but only in the measure requisite to safeguard the liberty of all. This is the general principle which in all countries inspires enactments affecting individual liberty, liberty of the press, liberty of speech, liberty of association, liberty of instruction, and even religious liberty. According to the subjective theory, the interference of the State cannot exceed this. It can impose no restraint upon the exercise of individual liberty in any interest other than that of society, for example, in the interest of the individual himself who is object of the restraint. Furthermore, the State can impose no affirmative obligation upon the individual beyond the payment of taxes established for the needs of the community such as taxes in money, kind, or in blood. According to the subjective doctrine the State cannot

impose upon the individual the obligation to work or to acquire an education or to lay aside a provision for the future.

Now, it is a well-known fact that numerous modern enactments are in open conflict with these doctrines. In all civilized countries in Europe and America, in varying degrees, laws restrict the activity of the individual in his own interest; or make obligatory an education and the laying aside of a provision. These laws are in absolute contradiction with the individualistic and subjective conception of liberty. Defenders of the individualistic doctrine, called also the doctrine of liberty, protest, and lament, claiming that these laws are contrary to every principle. Vain protests, vain laments! The change is evolutionary; it moves with the force of a natural phenomenon. It may, perhaps, be suspended or impeded for a while; it must eventually be accomplished. It is the natural and necessary consequence of that general transformation which I have explained, — of the new conception of liberty, not as a subjective right, but as a result of the obligation resting upon each one to develop his individuality, that is to say, his physical, intellectual, and moral activity as fully as possible in order to co-operate with all his forces towards social solidarity.

§ 11. **Principal Consequences of this Definition.** — This obligation is the immediate consequence of the fact of solidarity through the division of labor, which is the chief factor in social cohesion, that is to say, solidarity through the procurement of the satisfaction of man's multiform needs through his diverse activities. Each individual is bound, therefore, to play his rôle in society, to accomplish a certain task, and, for that reason, to develop to the greatest possible extent his forces and his aptitudes in all directions. Liberty is not man's by right; he is under a social duty to act, to develop his individuality and to perform his social mission. None may oppose his acts done with this purpose, provided, of course, that his acts do not impair a like liberty in others. The State may not interfere to limit a man's activity when exercised with this end in view; it should protect all his acts tending towards this purpose and repress and punish all such as have a contrary tendency.

Up to this point the new system leads to almost the same consequences as the individualistic system. But now appears the profound difference. If man is free only to develop his individuality and that only in proportion as his acts tend towards this aim, it follows that he may do nothing to restrain or arrest that development, and that the State, the voice of objective law, may and should

interfere to forbid his so doing. Where the State does so it impairs no so-called right, but simply applies the law of social solidarity, which is the fundamental law of all modern communities.

The first and obvious consequence, then, is that any law prohibiting and punishing *suicide* would be justifiable. It is not, of course, intended to restore the ancient practice regarding dead bodies and to deny the right of burial of suicides. By the prohibition and punishment of suicide, is meant the punishment of the attempt at suicide and the prosecution of the accomplices.

French law to-day does not punish suicide. But, under the influence of Christianity, early French law did punish it. Customs differed, no doubt, as to the application of the punishment; but the repression existed in all parts. It fell not only upon him who survived the attempt, but also upon the successful suicide, through the confiscation of his estate. This state of the law was entirely abolished by the Revolution. The principle of individual liberty was then proclaimed, and with it the liberty to kill oneself, which was left free from any repressive measure. Modern legislation has adopted this point of view, and law nowhere to-day yet punishes attempted suicide.¹

But some countries punish complicity. For example, in England one who aids a suicide is held a murderer. Brazil, Holland, Spain, and Hungary imprison the accomplices of a suicide. There is certainly an inconsistency here. If suicide is lawful, the act of a third party participating therein cannot constitute an infraction of the law. Yet it is true that the punishment aimed at the accomplice paves the way for the repression of suicide itself. Our conscience, which is daily becoming definitely convinced of the fact of social solidarity, must soon demand its repression by all civilized legislations.²

¹ The Criminal Code of Austria of 1803 appears to be the only European Code which in the 1800s punished suicide. It distinguished between the attempt voluntarily suspended and the attempt which failed of effect through a cause exterior to the will of the subject. In the former case, the party was warned by the magistrate; in the latter case he was imprisoned, rigidly watched, and subjected to an appropriate physical and moral treatment. If the attempt succeeded, the body of the guilty party had to be interred outside the cemetery after pronouncement by the court. None of these provisions passed into the Austrian Criminal Code of 1853 which is now in force. Cf. Garraud, "Traité de droit pénal" (2d ed., 1900), Vol. IV, pp. 630 *et seq.*

² Under the French Criminal Code, suicide not being a breach of the law, the accomplice cannot be punished. Thus, any one inciting the act or preparing or facilitating it, escapes all penalty. Writers of good authority admit, however, that while participation in the suicide cannot be held a crime, it is not so with the voluntary killing of another with that other's consent or upon that other's command or entreaty. "In this last

Upon like principles the law should punish *duelling*. Many legislations do prohibit and punish it, and such a prohibition undoubtedly tends to become general. Man should not be allowed to expose himself needlessly to death. The duel is a survival of a barbarous epoch when justice was unorganized, and of a superstitious belief in the judgment of God.¹

The law should prohibit all *dangerous games* where man jeopardizes his life without advantage to society. The life of the individual is a social asset and it cannot be permitted to be endangered

case", says *Garraud*, "the person killed, though he sought death, played but a purely passive rôle; the author of the act, the principal, is he who causes the death. Such facts, consequently, come within the implied terms of the definition of murder and assassination." Cf. "*Traité de droit pénal*" (2d ed., 1900), Vol. IV, p. 635; so also, *Hauss*, "*Législation criminelle*", Vol. III, p. 210; the decision of the French Court of Cassation, Criminal Section, August 21, 1851, reported in *Sirey*, 1852, I, p. 286.

¹ Most modern legislations punish duelling as a special breach of the law, defining it as: a prearranged combat fought with deadly weapons between two or more persons, in reparation of offended honor, preceded by a challenge, and taking place before witnesses. Cf. particularly the Criminal Codes of Belgium, Arts. 423-433; Holland, Arts. 152-153; Hungary, Art. 297; Germany, Arts. 201-210; Italy, Arts. 237-245. In the early history of France, numerous royal edicts from Henry II to Louis XVI punished duelling by severe penalties. But neither the legislation of the Revolution nor the present Criminal Code refer to or punish it. By a decree of July 15, 1794 (27 Messidor, year II), the Convention declared that no law either provided against or punished inciting to duel and the matter was referred to the Commission for the revision of law, which was to examine into the means of preventing duelling. Cf. *Merlin*, "*Répertoire*" (5th ed., 1827), under heading "Duel", at p. 493.

What led the legislator of the Revolution and Empire to refrain from repressing the duel? It is not necessary to seek beyond the individualistic doctrine which dominated the minds of the period. The legislator could not punish duelling, since duellists exposed themselves voluntarily to death and since the legislator had no right to prevent the individual from killing himself or exposing himself to death. For a long time the decisions of the French Courts were inspired by the same idea. It was held that homicide and wounding in a duel constituted neither a crime nor a tort. Cf. Court of Cassation, Criminal Section, December 4, 1824, reported in *Sirey*, 1825, I, p. 6, and August 8, 1828, *Sirey*, 1828, I, p. 393. But on June 22, 1837, all the sections of the Court being united, upon argument by the Attorney General Dupin, the Court of Cassation modified its opinion and decided: "that the terms of Articles 295 and 296 of the Criminal Code (defining and punishing homicide) are absolute and allow of no exceptions . . . , that while no act of the legislature makes duelling, as such, a crime, or the circumstances preparatory to and accompanying it, yet no provision of law places these circumstances among the facts justifying killing, wounding, or the giving of blows . . . , that it is an inviolable maxim of public law that no one shall be allowed to take justice into his own hands. . . ." Cf. text of the opinion of the Court and of Attorney General Dupin in *Sirey*, 1837, I, pp. 465 *et seq.* This case finally settled the direction of French judicial law. Duelling is now not punishable of itself as a crime or as special wrong, but killing or wounding in a duel are grounds of punishment and witnesses of the duel are liable as accomplices. This is simply an application of Arts. 295 *et seq.* of the Criminal Code. This system presents in practice very grave defects. There is evidently a lacuna in our law which it is most desirable to fill.

for other than social interests. For example, laws very justly are tending to suppress the bull fights which disgrace Spain. In the last few years these games have unfortunately passed from Spain into the South of France. The French Parliament has under consideration a law which shall prohibit them absolutely, and it will very probably be voted. Yet the law excites protest because it is said to infringe liberty. Such a protest is without value and does not merit our consideration.

Certain classes of *labor* are dangerous yet indispensable. In these cases the legislator should interfere to prescribe proper measures to minimize the danger. It is useless, in opposing such legislation, to rely upon the so-called right of the individual to do as he pleases. By imposing measures of safety the legislator merely protects human life as a social asset. Many countries have a very complete law in this matter. France possesses a series of laws and decrees, notably the Act of June 12, 1893, upon the health and safety of workmen in industrial establishments; the Acts of July 8, 1890, March 25, 1901, May 9, 1905, July 23, 1907, and March 12, 1910, upon the safety of those employed in mines. These laws elaborate their own method of enforcement in an interesting manner. The miners themselves appoint representatives whose duty it is to see that the law is strictly applied: "Representatives charged with caring for the safety of miners are appointed who shall visit the underground works of the mines . . . , for the sole purpose of examining into the conditions of safety of those employed there; and further, in case of accident, the circumstances causing the accident. . . . All the representatives and substitute representatives to be elected are balloted for simultaneously. . . . The electors of a given district are the employees who work underground. . . ." ¹

In the same spirit, the law may and even should limit the maximum number of hours of labor per day. It is probable that in the near future all the legislatures of the civilized world will have passed similar laws in this matter. The reason for such laws is the adoption of the conception of liberty as a function in place of liberty as a right. It is needless to call attention to the endless controversies that have arisen in this matter and that still remain unsolved in most countries. I believe that the chief cause of these controversies is that almost everywhere, and it must be admitted, particularly in France, the problem has been badly stated. One political party without dissent has demanded laws limiting the

¹ Act July 8, 1890, Arts. 1, 4, and 5.

working hours per day on the basis of the struggle of classes. This party has claimed that the legislator should intervene to protect the workmen against the capitalist who was exploiting him. And to this it has been answered, not indeed without force, that between master and servant, between employer and employee, a contract exists which must remain free, and that the legislator can no more interfere in the contract of labor than he can in other contracts.

The problem is poorly stated. No question of liberty of contract enters here. The question is simply to ascertain whether by working every day beyond a certain number of hours, the laborer injures his health, his life, his intellectual and moral individuality. Once the fact is established that he does, the legislator should interfere to prevent the healthful maximum period of labor from being exceeded. By doing so he is only protecting human life as a social asset. The law should interfere not only when the workman labors for another, but when he labors in his own interest. The essential aim of the law is not so much to protect the workman from his employer as to protect the workman from himself and in spite of himself. Here is certainly proof that no question of the right of contract is involved.

In France the law regulating the maximum hours of labor per day is very complex, but, nevertheless, as yet very incomplete. An old law of September 9, 1848, limits the hours of work in factories and shops to twelve per day; under the terms of the Millerand Act of March 30, 1900, the hours of labor may not exceed ten in establishments employing in the same premises adult men, minors, and women; finally, the special enactment of June 29, 1905, fixes the maximum working day in mines at eight hours.¹ The Committee on Labor of the French Chamber of Deputies is now considering a law to fix the working day in all industrial establishments at a uniform maximum of ten hours.²

¹ When this was written, the Committee on Mines of the Chamber of Deputies was considering a law relative to an eight hour day in mines, which was to modify and enlarge the Law of June 29, 1905. After having been voted by the Chamber, it was passed with a few changes by the Senate. The Committee of the Chamber of Deputies, desirous of realizing the reform, made certain concessions to the Senate and the Chamber passed the new law in the session of March 30, 1912. Cf. *Duquít*, "Traité de droit constitutionnel" (1911), II, pp. 64 *et seq.*

² In the session of February 8, 1912, the Chamber of Deputies reached the discussion of the law proposing to fix the working day as a general rule at ten hours. The discussion has not yet been concluded. [On November 26, 1912, the French Legislature adopted a Code of Labor; cf. *Dalloz*, "Recueil Périodique", 1912, IV, pp. 58 *et seq.* Of this Code, Chap. III regulates the normal maximum day of work. By Art. 6, in shops and factories it is fixed at 12 hrs.; by Art. 7, if adults and minors work to-

What has just been said regarding a maximum working day is true of a weekly day of rest.¹ The legislator certainly may not prohibit during any day of the week chosen at random the running of commercial, industrial, or agricultural establishments. If he did, I would not say that he was impairing the liberty of commerce and of industry, for I deny that such a right exists; I would say that he was impeding the free development of social forces and so exceeding his powers. But the law may and should prohibit workmen from laboring more than six consecutive days — that is to say, it should prevent them from working the seventh day — once it is established as a fact that uninterrupted labor transcends human forces and injures the work-value of each individual. This represents the point of view adopted by the French Act of July 13, 1908. Contrary to a prevalent opinion, it does not require that commercial or industrial establishments be closed during some one day of the week, but that workmen should rest the seventh day, naturally Sunday. Furthermore, it gives a large liberty to appoint a day of rest to each of the units of the working force by turn.

§ 12. **Statutes relating to Workmen and Pensions.** — By way of conclusion, let me add that the new conception of liberty as a function explains all that new body of law imposing positive obligations upon the individual. A law imposing upon all the obligation to work would be perfectly justifiable. Perhaps the enforcement of such a law would be rather difficult; but the difficulty might be solved by laying a specially heavy tax upon those who remain idle. I know of no such law as yet, and it probably will not be necessary for the legislature to interfere in this way; since in modern society, where competition is so keen and the struggle for life so bitter, the idle will of necessity disappear, crushed by the forces of society.

The laws of obligatory *education* fall also under this new conception of liberty. The legislator has, without a doubt, the duty and power to require that everyone receive a minimum of education. When the Republican Party in France voted the Act of March 28, 1862, providing for obligatory attendance in the primary schools, the Catholic Party claimed that it was an invasion of the liberty

gether, 10 hrs.; by Art. 14, minors over 13 and under 18, and women, at 10 hrs.; Chap. IV provides for a weekly day of rest. — TRANSL.]

¹ I knew that I was here touching upon a very delicate topic at that time in Buenos Aires. When I arrived in the city, August 19, 1911, a police ordinance had just ordered closed on Sundays all commercial houses including restaurants and cafés. The measure had aroused very intense opposition, which died down shortly after when the city administration promised to enforce the law with the greatest tolerance in the case of restaurants and cafés.

of the parent as the head of the family. Certainly, obligatory education is in contradiction with the conception of liberty as a right, as defined in the "Declaration of the Rights of Man" of 1789, and with parental authority under the Civil Code.¹ On the other hand, obligatory education is a necessary consequence of the conception of liberty as a function; since it is undoubtedly within the power and duties of the legislature to require that the individual receive that minimum of education indispensable for him to be a social value and to accomplish his work in the social laboratory.²

And lastly, these are the ideas that inspire the obligatory *insurance* laws, and in particular the Act of April 5, 1910, which created obligatory pensions in France for laborers and peasants. Every employee or workman is obliged to put aside out of his wage a certain sum which, added to the contribution of the employer and the State, provides a pension for him at the age of 65 years.³ Ideas have so progressed in the direction we have been indicating that the obligatory phase of the law, though still warmly contested a few years ago, was voted by a large majority in the French Chamber. True, the application of the Act meets with some resistance throughout the country; but the present is a period of transition and there is no doubt that a few years hence the laboring classes, then better enlightened, will accept its general application.

¹ Articles 371 *et seq.*

² Cf. on obligatory education: *Duguil*, "Traité de droit constitutionnel", Vol. I, pp. 76 *et seq.*

³ By the Budget of February 27, 1912, Arts. 54-62, modifications were made in the Act of April 5, 1910. Those to Art. 55 deserve mention. The normal age at which the pension commences is reduced from 65 to 60 years; however, the assured has the right of postponing payment to 65 years; and, according to the terms of Art. 57, the maximum augmentation by the State has been raised from 60 to 100 francs.

III. THE NEW CONCEPTION OF LIBERTY (*continued*):

AUTONOMY OF THE WILL, ARTIFICIAL PERSONALITY, AND ASSOCIATIONS

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| <p>§ 13. Autonomy of the Will as an Element of Liberty in General.</p> <p>§ 14. Provisions of the Napoleonic Code and the Argentine Civil Code establishing this Principle.</p> <p>§ 15. The Bearer or Subject of Right; Every Subject of Right is a Subject of Will.</p> <p>§ 16. Desperate but Fruitless Efforts of Jurists to Reconcile this Conception with the Facts of Modern Life.</p> | <p>§ 17. The Doctrine of Artificial Personality.</p> <p>§ 18. The Movement toward Association.</p> <p>§ 19. Futility of the Old Doctrine.</p> <p>§ 20. Elimination of the Idea of a Bearer or Subject of Right.</p> <p>§ 21. Legal Protection Based upon the Social Purpose or Function of the Act.</p> <p>§ 22. The Idea of Purpose in the French Law of Associations of July 1, 1901.</p> |
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§ 13. **Autonomy of the Will as an Element of Liberty.** — The autonomy of the will, as I have already said, is an element of liberty in general. It is juridical liberty, and may be defined in brief as the power of man to create by an act of the will a state of facts productive of legal result, whenever his act has a lawful object. In other words, according to the individualistic system, the autonomy of the will is the power to will juridically, and hence the right to have one's will upheld by society.

To the autonomy of the will is logically related the question of the bearer or subject of right, and so also to the problem of artificial personality. These are matters of capital importance, in which an evolution is going on in every way analogous to the change I have been describing, that is to say, an evolution in the realistic and social sense.¹

We here reach the very heart of the matter, and it presents great difficulty. However, I have not thought that it should be avoided, because it is the fundamental problem of modern law. I shall endeavor to present the matter in a strictly logical manner.

¹ The problem of the bearer or subject of right and of artificial personality has lately been the object of important and interesting studies, the most important of which are: *Michoud*, "Théorie de la personnalité morale" (1906), Part I; *Salviès*, "De la personnalité juridique" (1910); *Demoque*, "Les notions fondamentales du droit privé" (1911), notably chap. II, entitled: "La notion de sujet de droit", pp. 320 *et seq.*; *A. Lévi*, "La société et l'ordre juridique" (1911), notably the chapter entitled: "Le côté objectif et le côté subjectif du droit", pp. 244 *et seq.* A more detailed bibliography will be found in the author's "Traité de droit constitutionnel", Vol. I, pp. 2, 8, and 41.

§ 14. **Provisions of the Napoleonic Code on this Subject.**—First of all, let us carefully define the principle of the autonomy of the will under the individualistic system and determine its consequences. I cannot do better than refer to the various provisions of the Argentine Civil Code, which was evidently drafted by a great legal mind desirous of creating a work at once theoretical and practical. In this Code the system of the autonomy of the will stands out very clearly with all its elements. It is also evident in the Napoleonic Code, and it is from the French Code that most modern legislation has borrowed. But the principle is implied there rather than expressed.

The only Articles in the Napoleonic Code which enact the principle—and even then in an obscure manner—are Article 6, 1134, Par. 1, and Article 1156. By these it is provided that: “Contracts between private individuals cannot set aside laws affecting public order and good morals”;¹ that “Agreements legally made shall constitute the law for those who have entered into them”;² and that “In contracts the common intent of the contracting parties is to be sought rather than the literal sense of the words.”³

In the Argentine Civil Code I find, on the other hand, several Articles formulating the principle and its consequences very clearly: “A general renunciation of the law is without effect; but rights conferred by law may be waived, provided that such law only affects the interests of individuals and that such waiver is not prohibited” (Article 19); “All entities susceptible of acquiring rights and contracting obligations are considered persons” (Article 30); and lastly: “Juridical acts are lawful acts of the will, having for their immediate object to establish legal relations between persons, or to create, modify, transfer, preserve, or destroy rights” (Article 944). These are provisions of cardinal importance, remarkably well expressed and which in their concise terms summarize all the consequences of the juridical autonomy of the individual.

§ 15. **Every Subject of a Right is a Subject of Will.**—In law, persons are all those entities susceptible of acquiring rights. The person is the subject of right, that is to say, the entity possessing rights. But, since, as I think I have already shown,⁴ subjective right can only be a power to will, it follows that every subject of right is a subject of the power to will, and that nothing can be the subject of right that is not a being endowed with will.

¹ Art. 6.² Art. 1156.³ Art. 1134, Par. 1.⁴ Cf. Topic I.

Michoud has tried to maintain the contrary by arguing from Jhering's definition: "Subjective right is an interest protected by society." But Michoud's entire system crumbles, since it is impossible to maintain that subjective right, even if based upon interest, is, in the last analysis, anything but the power to will.¹ Every being thus endowed with will possesses a body of rights which the law confers upon him or at least recognizes in him, and which constitute his status or his legal sphere of action. This stands out clearly in Articles 19 and 30 just quoted from the Argentine Code.

The subject of right has a free and autonomous will. In principle he can by an act of his will modify his legal status or sphere of action, provided always that he wills what is not prohibited by law. In this way he performs a juridical act, that is to say, an act which will be protected by society, because it is an act of will having a purpose allowed by law.

The effect of this juridical act will be to diminish the legal status or sphere of action of one subject of right and to increase that of another; in the words of Article 944 of the Argentine Civil Code, to establish a juridical relation. In this way every state of facts productive of legal result leads back to a relation between two subjects of right, that is to say, two subjects of will, one of whom possesses a right and the other an obligation.

Under the individualistic system the theory of the autonomy of the will is briefly reducible to the four following propositions:

1. Every subject of right must be a subject of will.
2. Every act of the will performed by a subject of right is protected as such by society.
3. The protection of the act is conditioned upon the lawfulness of its purpose.
4. Every state of facts productive of legal result is a relation between two subjects of right, one of whom is the active subject and the other the passive subject.

§ 16. **Efforts to Reconcile this Conception with Facts of Life.** — As logic it is perfect; it is a rigorous deduction from the individualistic premise. But there is one misfortune: it no longer agrees in the least with the facts. There was a time in history when this system might have found its justification. It was adapted to a society that was essentially individualistic, such as Roman society and even European and American society at the commencement of the 1800s. But it is in absolute opposition to the social and group tendencies of our time. And the jurists (they still are numerous)

¹ Cf. above, p. 5, note 2.

who have remained faithful to the individualistic and metaphysical conception, which they regard as an impregnable doctrine, are making desperate efforts and producing prodigies of subtlety to force at all costs all the complex facts of modern life into the narrow frame of this out-grown system.

Bekker¹ imagined that very ingenious and subtle theory of the bearer or subject of a right, composed of two distinct elements: the "Genüsser" and the "Verfüger", or the element which profits and the element which exercises the will; Gierke² employed his vast learning to establish the reality of collective personality; Zitelmann³ had recourse to a logic worthy of Hegel to demonstrate the reality of the collective will; Jellinek constructed a powerful system of public law based entirely upon the predication of personality to the State.⁴ In France may be mentioned Géný, Hauriou, Michoud, Demogue, Saleilles,⁵ the last of whom with a keen and penetrating mind attempted an impossible reconciliation between the realistic and metaphysical tendencies.

The conflict is irreconcilable. It has been very well brought out in an article by Michoud, written for the occasion of Gierke's seventieth birthday. In the "Festschrift" offered to this eminent jurist Michoud wrote: "In the field of public law the battle is being waged between those who would maintain the old conceptions of private law, that is to say, of legal personality, of subjective right, of the necessity of mutuality in juridical facts, etc., and those who, holding these conceptions narrow, arbitrary, and over-formalistic, would substitute conceptions that more nearly approach social reality." Michoud is right.⁶ But the two camps are not at grips in the field of public law alone; but also in that of private law. In both cases the same combatants, the same strug-

¹ "Zur Lehre vom Rechtssubjekt", "Jahrbücher für die Dogmatik" (1873), XI, pp. 1 *et seq.*

² "Genossenschaftsrecht" (4 vols., 1881-1885); "Genossenschaftstheorie" (1887); "Das Wesen der menschlichen Verbände" (1902); "Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien" (1902).

³ "Begriff und Wesen der sogenannten juristischen Personen" (1880).

⁴ "System der öffentlichen Rechte" (2d ed., 1905); "Allgemeines Staatsrecht" (2d ed., 1905). Cf. Holder, "Natürlichen und juristischen Personen" (1905); Binder, "Das Problem der juristischen Persönlichkeit" (1907); O. Mayer, "Die juristische Person und ihre Verwertbarkeit im öffentlichen Recht" (1908); Bernatzki, "Kritische Studien über den Begriff der juristischen Personen", "Archiv des öffentlichen Rechts" (1890), pp. 159 *et seq.*

⁵ "De la personnalité juridique, histoire et théories" (1910).

⁶ Michoud, "La personnalité et les droits subjectifs de l'État dans la doctrine française contemporaine", extract from his "Festschrift" in honor of Gierke (1911), p. 493.

gle. A decisive victory for realism is at hand. Every metaphysical conception must be banished from the science of law as they have been banished from the other sciences; this is the price of the law's progress.

Let us now take up in turn each of the four elements of the individualistic system of the autonomy of the will and show by the evidence of facts how it is disappearing or being transformed. I am not sufficiently acquainted with Argentine law to make any positive statement regarding it, but I am disposed to believe that the statutes and the cases have gone a little further in France than in that country.

§ 17. **The Doctrine of Artificial Personality.** — The first proposition may be thus stated: Every subject of right must be a subject of will. It follows, evidently, that there is no subject of right except where there is will, and that no entity is juridical, that is to say, no entity can actively figure in legal relations, unless endowed with will. Personality exists in law only where there is will.

So long as the activities of society were generally carried on by individuals, the artificiality of this proposition and its incongruity with the facts were not apparent. To explain the legal personality of a minor or lunatic he was declared to have a constructive or potential will sufficient to make him a subject of right. Doubtless, even in the most individualistic communities, certain groups have always existed whose capacity to act juridically had to be recognized and whose status had to be guaranteed. It was impossible to discover any will in them, even potential. There was, of course, the will of the individuals forming the group, or that of the donor of the fund. But these individual seats of will could not serve as a basis for a legal personality in the group itself. The fiction of an artificial person was then imagined. Only individuals were declared to be natural persons; the group possessed no will apart from its members; but the law, by its absolute authority, was able to assign legal personality to it. Consequently a group constituted a juridical person only by action of the legislative or the executive power, wherever, in the latter case, an organic law had given the executive authority to this effect.

As a doctrine, this solution, known as the entity theory, was developed principally by Savigny.¹ For a long time it was taught as a sort of incontrovertible doctrine; I remember that when I studied law it was taught as a self-evident truth. The majority

¹ "Traité de droit romain" (French translation by *Guenoux*), Vol. II, pp. 223 *et seq.*

of legal systems adopted the theory. It was that of the Napoleonic Code; it persists in Argentine law. The Argentine Code contains a series of very explicit and well-drafted articles that form an exceedingly clear and complete expression of the entity theory. For example, Article 31 declares that: "Persons possess either an artificial or natural existence . . ." and Article 32 says: "All those entities susceptible of acquiring rights or of contracting obligations, not being persons possessing a natural existence, are persons having an artificial existence or juridical persons." Article 33 then enumerates the principal classes of juridical persons. Some have a necessary existence; such for example is the State. Others have a potential existence; these are institutions recognized of public utility, public corporations, associations, stock companies, and partnerships. Lastly, the most fundamental of all provisions, Article 45, declares that: "The existence of public corporations, associations, funds, etc., as juridical persons commences from the day when they were authorized by the legislature or the executive, after approval of their articles of incorporation, and ratification by the bishop where they are of a religious character." So, under Argentine Law, the group does not naturally of itself enjoy juridical personality. It can possess such existence only by express declaration of the law or a concession from the government.

§ 18. **The Movement towards Association.** — Such a system can persist in a country where associations are relatively few. In the Argentine Republic, only those public corporations and associations upon which the government confers personality are subjects of right. In countries where a movement towards associated activity is strong such a condition would be impossible. In certain European countries a movement towards associated activity has been proceeding with extraordinary vigor for about half a century and particularly during the last twenty-five years. Then all the artificiality, narrowness, and incongruity of the entity theory came to stand forth clearly. It broke like a straw.

This movement toward associated activity has made itself felt most strongly in three European countries, Germany, England, and France.

In France it is deserving of particular study. I may not here make such a study, but I especially desire to emphasize the fact that the powerful reaction against the results of the French Revolution has manifested itself with unusual strength in this movement toward association. The Revolution believed that association was the very denial of individual liberty, and, on enumerating the

rights of the individual, the liberty of association was intentionally omitted. The Revolution even categorically forbade a certain class of associations, viz.: industrial organizations; and the law known as the *Le Chapelier Law*, of June 27th, 1791, remained in force until the Act of March 21, 1884, regulating trade syndicates. But all these legislative prohibitions proved worthless. Facts are stronger than the decrees of man, and the whole of France is covered by a vast network of associations of every kind; labor organizations, every class of industrial organization, even associations of government employees, mutual associations, benefit societies, literary, scientific, and artistic societies. Willingly or not, the legislator has been forced to admit an accomplished fact and finally to sanction institutions which have sprung up naturally and spontaneously in spite of prohibitive laws. In this way in 1884 the law came to recognize industrial associations or unions, in 1898 mutual aid societies, and finally in 1901 the liberty to associate in general. At that time, it is true, a question very closely related to the right to associate arose in France and to a certain extent distorted our legislation. The question was that of the religious orders. I regret to say that politics dominated the legislation on the subject; I shall not, therefore, consider it.

Meanwhile in Germany a similar movement was going on. It is less striking there, not because it is less deep seated or extensive, but because German law has never shown the resolute opposition of the French legislator to associations and corporations. Like France, Germany is covered with associations and corporations of all kinds, and the tide shows no sign of ebbing.

A surrender to the force of facts was necessary. Legal protection to associate activity cannot be left to the arbitrary dictates of a government. It is absolutely necessary that every group, by reason of the fact that it pursues a lawful object, be allowed to organize freely and find in law the requisite protection to its acts.

Furthermore, the entity theory explains nothing. A group either has no will distinct from its members, and in that case it cannot be a bearer or subject of right, and the law, powerful though it is, cannot produce what is non-existent; or a group has in fact a will distinct from that of its members, and in that case it is naturally, of itself, a subject of right and the intervention of the legislature or the executive is unnecessary. For, need it be given what it already possesses?

§ 19. **Futility of the Old Doctrine.** — This explains why about forty years ago there originated among German and French jurists

an effort which is surely one of the most curious known to legal history. The attempt was made to prove and explain how, independent of any agency of the law, an association organized for a lawful object was undoubtedly a subject of right and possessed a juridical personality distinct from its members.

Of the Germans we have already cited the eminent name of Gierke. He developed the essential elements of this theory with marvelous art, upon the postulate of a "constructive legal voice."¹ His work was taken up, examined more profoundly, and stated more precisely, in the field of public corporations, by Jellinek. Bekker conceived the ingenious theory of the composite subject of right, made up of two elements, of whom one profits ("Genüßer") and the other acts ("Verfüger"). The name of Zitelmann has also been cited. By subtle analysis he attempted to show that there resided in reality in every group a will distinct from its members which served as a basis for a collective personality. He went so far as to say that if a fund may be a subject of right it is because the will of the donor of the fund, though he died perhaps centuries ago, survives and becomes the subject of right. I have already spoken of the vigorous efforts made by Michoud in France to construct a complete theory of collective personality.² It was ingenious in appearance, but it led in the end either to the classic theory of an artificial entity or to the adoption of Bekker's doctrine, combined with Gierke's and Jellinek's theory of a constructive legal voice.³ Lastly, Saleilles has recently made a very searching

¹ In two celebrated works: "Le droit des associations" and "La théorie des associations."

² Cf. his notable work: "Théorie de la personnalité morale."

³ Michoud's doctrine comes to this: Subjective right is not the power to will: it is simply an interest that is protected, viz.: "the interest possessed by a person or group of persons, and legally protected through the power recognized in the will to represent and to defend that interest" (*loc. cit.*, p. 105). Consequently a subject of right will be "any collective or individual being whose interest is thus guaranteed, even though the will which manifests the interest does not belong to that being in a metaphysical sense. It is enough that the will can be attributed to such a being by society or be manifest in its acts for the law, without deviating from its rôle of interpreter of social phenomena, to be obliged to regard such will as belonging to it" (*ibid.*, p. 105). Now, even assuming interest to be the basis of subjective right, still his entire system crumbles, if it is true, as I think I showed in Topic I, that subjective right is necessarily a power to will. Cf. especially *ante*, p. 5, note 2, and Duguit, "Traité de droit constitutionnelle" (1911), Vol. I, p. 2. Michoud declares that will is necessary; that this will is attributed by society to or is manifested by the acts of the collective or individual entity which is the subject of right; that this will is its constructive legal voice; and that it is inseparable from the entity. Then, one or the other must be true; either Michoud must admit, as we do, a will pursuing an object protected by law and so come to deny the existence of the bearer or subject of right; or he must maintain the

but rather unfavorable analysis of all these doctrines. His was a conciliatory type of mind. He tried to prove that at bottom all these discussions have no great importance. And he was right; they have, indeed, no importance. However, I cannot agree with his general conclusion that: "As to these doctrines it seems that we are divided merely by continued misunderstandings and that to agree upon a terminology would be to dissipate these differences. This has been my endeavor."¹

No, this is not true. There is a complete and absolute disagreement between those who insist on maintaining in modern law the metaphysical and out-worn theory of a subject of right, and those who, like myself, demand that we face the facts, rejecting all metaphysical conceptions, especially that of subjective right and of a bearer or subject of right. With this reservation Saleilles was right. These controversies are entertaining intellectual pursuits, nothing more. They are useless, for the excellent reason that the problem which they claim to solve does not exist.²

§ 20. **Elimination of the Idea of a Subject of Right.**—Are groups, associations, corporations, funds, etc., by nature subjects of right or are they not? I do not know; and the question does not interest me. Are they or are they not possessed of subjective rights? I repeat: I do not know, and I am quite indifferent; for, as subjective right does not exist, the subject of such a right does not exist either. The sole question is one of fact. Is the group, association, corporation, or fund, pursuing a purpose which conforms with social solidarity, as it is conceived at a given moment in a given country, and consequently in accordance with the law of that country? If so all acts done with this purpose should be recognized and protected by law; and the application of property to such a purpose should also be protected. It is unnecessary to inquire whether a group is a subject of right with capacity to be a party to a juridical act; the query is simply whether the purpose pursued by the group conforms with social interdependence, or whether the particular act is done with this end in view. It is unnecessary to inquire whether a group is a subject of right ca-

conception of a bearer or subject of right and thus make that subject an artificiality or, like Bekker, a compound entity composed of an element which profits and an element which wills, and this is also in reality a fiction. It seems to me difficult for Michoud to escape this alternative.

¹ *Saleilles*, "De la personnalité juridique" (1910), p. 663. I desire to express here my affectionate appreciation of this friend and my boundless admiration for this jurist whose death was so premature.

² Cf. Appendix II [omitted in this translation; it deals at greater length with Michoud's theory. — Ed.].

pable of owning property; property as a subjective right exists no more than the other subjective rights. My test will simply be whether the property is used for collective purposes; if those purposes are recognized as conforming with social solidarity, the use is to be protected. It is needless to ask whether the individual who wills and acts with a collective purpose is the "constructive legal voice", or is the agent or representative of the so-called collective personality.

The mass of useless subtleties that have grown up about this question is unbelievable. The truth is this: The individual whose will is determined by the purpose pursued by the group, exercises his will conformably to law; his act is productive of a result which must be protected, because what the law protects primarily in a juridical act is the purpose determining the act, rather than the will itself.

§ 21. **Legal Protection based upon the Social Purpose or Function of the Act.** — Briefly, then, we return always to that same fact of social function, to that realistic conception of social function which is everywhere replacing the metaphysical conception of subjective right. Modern communities are not composed solely of individuals, they are also made up of groups. Individuals are, of course, the cells that constitute the social plasm. But, the cells are arranged to form groups. Each group is charged with a certain mission; it, too, must accomplish a certain task in the division of social labor. Every act of will aiding in the accomplishment of this mission or the realization of this work must be protected by the community.

An act of will remains an act of will of the individual. Collective will does not exist, — or at least no one can prove that it does. To speak of the collective will of groups, localities, municipalities, corporations, nations, is to employ an abstract term. When the will of an individual is determined by a collective purpose, it still remains individual. The law no more protects the collective will than, in reality, it protects the individual will; it does protect and guarantee the collective purpose which an individual will pursues.

What are the groups that form, so to speak, the nerve centers of modern society? Is the family first in importance, as some still claim? Or are they not the industrial groups, the classes of society organized into unions or syndicates? I am tempted to believe so. But that is purely a sociological question which I prefer not to touch upon.

§ 22. **The Idea of Purpose in the French Law of Associations.** — Legislators and judges, unconsciously perhaps, are steadily facing about in the direction that I have indicated. This is proof of the truth of the idea that I have been developing, and of my early statement that law originates spontaneously, unknown to those who contribute to its confection and often in spite of them. I cannot take a better example than the well-known French Law of Associations of July 1st, 1901, — often called the Waldeck-Rousseau Law from the name of the Prime Minister who was its sponsor.

The Constitution of 1848 had for the first time in France proclaimed the principle of liberty of association. The declaration was hardly more than philosophical in its results; for over fifty years passed without the appearance of a law regulating the exercise of this fundamental liberty. The chief obstacle to the passage of a law regulating the liberty of association was, of course, the problem of the religious orders. Yet, in spite of the silence of the law, in spite even of legislative prohibitions, French soil, as I said before, came in one way or another to be covered by all kinds of associations. The pressure of facts made the French Deputies pass the law of 1884 regulating trade syndicates and the law of 1898 regulating mutual aid societies. It still remained to pass a general law regulating the liberty of association. In 1898-1899 came the Dreyfus affair with its grave disturbances throughout the country. The rôle, real or supposed, which was played in that affair by certain religious orders, afforded a pretext to the Government to present a law which should impose a Draconian severity upon religious orders, yet formulate the principle of liberty for all other classes of associations, even religious, provided they did not possess the character of a religious order. For that reason the Law of 1901 is divided into two quite distinct parts. Section 3 relates to religious orders and subjects them to a penal regulation so rigorous, in fact, as to be the very denial of liberty;¹ and Sections 1 and 2 relate to associations not possessing the character of a religious order.

On reading this Act, one is immediately struck with the fact that the traditional expression, artificial or legal personality, is nowhere contained in it. No doubt it can be found frequently in laws subsequent to that of 1901, but it is, at least, remarkable that the expression is not used in the organic law of associations; and this fact would seem to indicate that the legislator justified the protection accorded to lawful associations upon other than the unsatisfactory

¹ With this part I am not concerned.

grounds of legal personality. The exclusion of the term "artificial personality" was not by mere chance, for it appeared in the draft of the law as it was submitted by Waldeck-Rousseau; even a definition of artificial personality was attempted; it was described as a legal fiction. But it was all stricken out in the final text, a fact which is of no little significance.

Taking, now, the text of the Act, we find this new conception which is at the bottom of modern law, the idea of purpose, in every provision. We are not far distant here from what I have been explaining. The modern legislator does not protect the collective will of the association, a will that does not exist; nor its personality, also non-existent; but rather the collective aim pursued by its members. Article 1 of the Act defines an association, distinguishing it from a company by reason of its purpose: "An association is the contract by which two or more persons permanently contribute in common their knowledge and activity towards a purpose other than the distribution of profits." Article 2 provides that: "Associations of persons may be formed freely without prior authorization or decree of the government; but they shall not possess legal capacity unless they conform with the terms of Article 5"; and Article 3 provides that: "Every association founded upon an unlawful 'cause' or in view of an unlawful purpose, or contrary to law or good morals, or whose object is to endanger the national territory or the republican form of government, is void and without effect." The function of the object of the association again stands out very clearly in the following provisions of the same Act: "Every association duly registered may without special authorization . . . 3d. acquire such real estate as is absolutely necessary to accomplish its purpose";¹ "Such associations (recognized of public utility) may perform all civil acts not prohibited by their Articles of Association; but they may not possess or acquire other real estate than that necessary to accomplish their purpose. . . ." ² Thus everywhere throughout the Act the idea of purpose is apparent.

This legislation is in contradiction with the conception of artificial personality properly so called. For, if an association has juridical personality, why limit its sphere of activity to a particular purpose? Had the law in its power really conferred upon associations, established according to certain rules, the attributes of a subject of right, the limitation by purpose would have no reason;

¹ Article 6, § 3.

² Article 11; the words within parenthesis do not appear in the Act.

it would be unexplainable.¹ On the other hand, the whole Act is made quite clear if we realize that the legislator, perhaps unconsciously, was caught by the great current which is moving modern law. Persons may, without prior authorization, organize into associations provided their purpose is lawful. Furthermore, the legislator has not defined a lawful purpose. In this he has done wisely, because the notion is essentially a changing one, varying with the ideas of each people and period concerning social solidarity. The acts of the members of the association, performed with a lawful aim, are secure under the law; and the use of wealth for such ends is also protected.

That in a nutshell is the entire principle of the Act of 1901. It is purely realistic and exempt from all those metaphysical difficulties belonging to the individualistic system.

Unfortunately the French legislator did not carry this Act to its logical conclusion. He allowed himself to be governed by a fear that is traditional in France, the fear of mortmain, or the apprehension of too great expansion of the estates of organized groups of persons. The fear is absurd and in absolute contradiction with the facts. Nevertheless, dominated by this superstition, the legislation of 1901 prohibited as a general rule gifts to associations, permitting them only by way of exception where the association has

¹ To the conception of purpose belongs also the rule of special use, as it is called, as applied to administrative bodies (municipalities, departments, public establishments, and the State itself perhaps). Introduced through the decisions of administrative courts, the rule may be considered to-day as settled. According to it each public "res" or fund is destined by law for one or more determined uses. Only those juridical acts which are performed in accord with these uses are valid and have effect. Again we see the conception of personality replaced by that of purpose; the law no longer protects the act of will of a fictitious collective personality, but the purpose which a proper administrative officer is lawfully pursuing. Under the entity theory it is impossible to explain the rule of special use. Even Michoud has to admit the existence of the rule; and to explain it he is forced to give great importance to the element of purpose, at the risk of inconsistency with his doctrine as a whole. In a notable instance he writes: "Those who believe in the reality of collective personality are obliged to admit the rule (the theory of special use), because such reality consists in the existence of a group of persons pursuing together a determined interest. That alone is enough to make purpose for the group something different from what it is for the individual. In the case of the group, purpose is a legal factor of far greater importance than in the case of the individual. The law does not stipulate the use which man shall make of the juridical resources at his command. On the other hand, it does stipulate the use in the case of the group, when once organized, because these resources are intended to provide for the accomplishment of that certain interest in view of which the group was formed." "*La théorie de la personnalité morale*" (1909), Part II, p. 146. Is this not simply the purpose theory? Cf. *Ripert*, "*Le principe de la spécialité chez les personnes morales*" (1906).

obtained a government decree that it is of public utility. The restriction will certainly not endure ; it is bound to disappear in the very near future under the pressure of facts.

So, the first consequence of the metaphysical principle of the autonomy of the will is slowly but certainly vanishing in all countries that have reached a like plane of civilization. In its place is developing a new legal conception of vital importance, based upon the realistic idea of social function.

IV. THE JURIDICAL ACT, AND THE LAW OF TESTAMENTS AND CONTRACTS

§ 23. The Autonomy of the Will.	§ 31. Roman Conception of Contract.
§ 24. The Declaration of Will.	§ 32. Juridical Acts which are not Contracts.
§ 25. The Object and Aim of the Juridical Act.	§ 33. Conduct Equivalent to Contract.
§ 26. Legal States of Facts which do not constitute Relations between Two Subjects.	§ 34. Acts of Uses of a Public Service.
§ 27. Private Foundations created by Testament.	§ 35. Acts constituting so-called Collective Contracts.
§ 28. Decisions of the Courts on this Subject.	§ 36. Concession to operate a Public Service.
§ 29. Changes in Theory of Contract.	§ 37. So-called Collective Contracts of Labor.
§ 30. Individualistic Conception of Contract.	§ 38. Compacts Equivalent to Laws.

§ 23. **The Autonomy of the Will.** — Under the same forces that are destroying the first consequence of the individualistic system, the other consequences attaching to the principle of autonomy are disappearing or being wholly transformed, namely, the conception of the juridical act and of the juridical state of facts. So also the contract, a part of the law which in the individualistic system occupied an important place and which, though not necessarily derived from the conception of the autonomy of the will, was yet closely allied to it, is undergoing a profound change.

It may be well to re-state the principles that have so far been formulated.

First, under the individualistic system, every subject of right must be a subject of will. Now, it has been demonstrated that that is not true ; that the conception of a subject of right is being discarded, and that modern law is protecting the juridical acts of groups though the groups can not possibly be regarded as subjects of right.

Second, under the individualistic system, every act of will of a

subject of right is protected as such. Here we lay our finger on the cardinal principle of the individualistic system of our codes; and it is a strictly logical consequence of the system. If we admit, as under the individualistic conception, that each person as such has a certain status or juridical sphere of action founded upon and measured by his natural ability to will; if we admit that the legal status of a group is constituted from the combined legal spheres of action of its members; it logically follows that the individual will is all powerful, and that, as it creates the juridical sphere of action of each member, it can in principle modify them; consequently a specific rule of law must really protect the will itself of the individual.

The juridical act may be defined, then, as any act of will whose purpose is to modify the status or the legal sphere of action of an individual. And this is, in fact, the very definition given by the Argentine Civil Code: "Juridical acts are lawful acts of the will having for their immediate object to establish legal relations between persons, or to create, modify, transfer, preserve, or destroy rights."¹ It is the will of the individual that is protected; and for no other reason than that it is the will of the individual.²

An abundance of texts prove that such was indeed the thought of those who drafted the individualistic codes. The Argentine Code has just been cited. I have also quoted the fundamental provisions of the Napoleonic Code.³ There is another rule of the Napoleonic Code upon which I would lay special emphasis: "In construing agreements the mutual intention of the parties shall be ascertained rather than the literal sense of the terms." This is certainly the rule which best formulates the principle that it is the will itself, the inward intent of the subject, which is productive of legal result.

Undoubtedly this marked a great progress over the formalism of Roman law. But those who drafted the Napoleonic Code, saturated (as we know) with individualism, were so swayed by the principle, that they made the grave error of admitting it even in the

¹ Art. 944.

² German jurists have called this "Willenstheorie" or the "will theory." It has been worked out principally by *Windscheid*, who admits certain limitations to it, but may be consulted to advantage. This celebrated author of "Pandekten" gives the following definition of a juridical act: "The juridical act is a declaration of the private intention aimed to produce a legal result" (7th ed.), Vol. I, p. 166; the work contains a complete bibliography of the question; cf. also *Enneccerus*, "Rechtsgeschäft" (1889); *Dereux*, "De l'interprétation des actes juridiques privés" (1905); *Duguil*, "L'Etat, le droit objectif et la loi positive" (1901), pp. 560 *et seq.*

³ Cf. chap. III.

transfer of title and the creation of property rights, when they should have made the publicity of these acts the condition of their validity.

§ 24. **The Declaration of Will.** — The whole of modern law revolts against the principle so understood. With regard to the transfer of title and the creation of property rights, everywhere we see growing up a well-thought-out system which imparts a truly social character to these acts, as I will explain later. And further, modern law tends more and more to admit that, as a general rule, what produces a legal result is not and cannot be the inward act of will (volition, as the psychologists say), but rather the external manifestation of the will, the declaration of the will, or “Willenserklärung” according to the German expression.

This is another direct consequence of the socialization of Law. So long as a specific rule of law represented merely a protection accorded the subject of will (and each human individual is such), the juridical act was essentially the inward act of will of the bearer or subject of right; it was this inward act of will that the law protected. But once it is admitted that a juridical state of facts is negligible and undeserving of protection save when it conforms to a social purpose, and that every juridical state of facts has force and effect only in the measure that it possesses a social reason, then such a state of facts can arise only out of an act which has itself a social character. Under this reasoning it can result only from an outward act of the will, because so long as the will is not manifested externally it is purely individualistic in its nature. The act of will becomes a social act only through its manifestation.

That is why modern law tends more and more to protect only the declared will. But I wish to emphasize that I do not say, as some do, that modern law is returning to the formalism of primitive Roman law. I make no such claim. Modern law does not insist that the will be manifested in a determinate form, oral or written. It requires merely that it be expressed; the form is immaterial. It cannot protect simply the inward act of will.

But, up to the present time at least, it would not be exact to say that modern law tends to require merely the declaration, without requiring a real intention to support it. An actuating will is necessary; there can be no juridical act unless there is a real intention. But it is also true that sometimes this will is implied, and that the legal consequences seem to attach to the outward act rather than to the inward will.

Let us consider now some of the more important practical

effects of this new conception which springs directly from the socialization of modern law.

Suppose that in fact the real will does not agree with the declared will; imagine a greater or less divergence between the two; the question is, can the part over which agreement is absent produce the legal result which was in reality desired, and not that which it declared it desired? In the traditional and classic system such proof is allowable. Article 1156 of the Napoleonic Code so decides when it says: "In construing contracts the mutual intention of the parties shall be ascertained rather than the literal sense of the terms." In the new system, that of the declared will, a party may not be heard to prove this. He may, indeed, prove that there was no act of will at all; though certain decisions of the French Courts seem even to refuse this. But he may not secure the recognition of a result which he has not manifested that he intended, though he desired it in reality.

French Courts, both civil and administrative, have already made some noteworthy applications of this doctrine. The German Civil Code¹ seems to go even further. It appears to provide that a declarant is not allowed to prove that he did not in reality intend certain things which he included in his declaration, and that as a general rule all the terms of the declaration must be given effect. This would seem to result from Article 116: "A declaration of intention is not void by reason of the fact that the declarant has made a secret reservation of not willing the matter declared. The declaration is void if made to a person who is aware of the reservation." Numerous difficulties attach to the interpretation of the Article in its more minute applications, and into these I cannot enter here.² It seems, however, that the solution offered by the German Civil Code presents many great advantages in practice.³

¹ In force throughout the German Empire since 1900.

² Cf. the admirable work of *Salcilles*: "De la déclaration de volonté; Contribution à l'étude de l'acte juridique dans le code civil allemand" (1902).

³ *Meynial*, in an article published in the "Revue trimestrielle de droit civil" (1902), pp. 545 *et seq.*, speaking of *Salcilles'* work, *supra*, note 2, summarizes with great clearness and exactness what seems to be the real point of view of the German Civil Code. He says (p. 550): "According to it (German Civil Code) the basis of the juridical act, what presides at its inception and fixes its import, is the declaration of the actor and not the will which that declaration is supposed to translate. No account is taken of the will until it is translated outwardly in the form of a declaration; from this declaration it is logical always to infer the existence of the will and to give it the same effect whether the will which it is supposed to interpret really exists or not." As to some of the practical consequences seeming to flow from this conception, *Meynial* says (*ibid.*, p. 555): "In the first place, the substitution of the declaration for the inward will as

§ 25. **Object and Aim of the Juridical Act.** — Whatever may be the case, I maintain my first point, that, as modern law becomes socialized, it is not the inward will but the declared will that is protected, because that alone is an act affecting society.

the basis for the juridical act affects the interpretation to be given that act. The judge must endeavor to discover not what the declarant intended in his inner consciousness, but what his declaration justifies our believing that he intended. Secondly, under the theory of declared intention, the classical doctrine of mistake and its effect upon contracts disappears. Doubtless mistake may have consequences, but they will be given different recognition." *Dereux* says: "In the declaration there is no longer room for distinguishing cause, essence, and motive; all such distinctions reposing upon a subtle analysis of will are suppressed; from the moment that a mistake is over a declared fact and is sufficiently material to have determined the consent of a party, the act is voidable." *Cf.* "De l'interprétation des actes juridiques privés", p. 239. *Salieilles* says: "The criterion which is to guide us in determining whether a mistake is to be taken into consideration is not the inward will which precedes the declaration, but the exterior and sensible act of declaration. In this way, the clue to the gravity of the mistake is withdrawn from the obscure realm of the inner thought and brought into the open world of the senses." *Cf.* "De la déclaration de volonté etc.", p. 19; *cf.* also *Leonhard*, "Der allgemeine Theil des Bürgerliches Gesetzbuchs", pp. 469 *et seq.* These citations show that, while the legal theory of the declaration of will is not fully developed, yet its elements are well defined. They show, too, that its consequences lead away from the classical conception of the autonomy of the will. *Meynial* said with truth: "What predominates in all the efforts to which I have alluded is that their aim and result is to restrain to a greater or less degree the autonomy of the individual. Once upon a time the individual was everything in a contract; it was the individual who provided. Now, on the contrary, the tendency is to show him powerless. . . ." *Ibid.*, p. 556; *cf.* *Portier*, "Des pouvoirs du juge en matière de contrats d'adhésion" (1909, thesis, University of Dijon).

I said (p. 56) that certain decisions of the French Courts seem to have relied directly upon the theory of the declared will. *Dereux* (*ibid.*, p. 241), who has made a long and remarkable study of all these questions, says that numerous decisions of the French Courts may be cited as anticipating the principle of the new German Code. For example, the Court of Pau held that mistake over incidental elements could not be considered unless the parties had expressly conditioned the agreement upon the existence of these elements. In the long passages (*ibid.*, pp. 152 *et seq.*), devoted to the interpretation of those acts constituting conduct indicative of assent and equivalent to a contract ("contrats d'adhésion"), he cites numerous decisions relating to insurance policies where the assured is recognized as bound by an acceptance "in toto" of the terms of the policy and may not be heard to prove that he did not intend to accept certain clauses. Is this not a recognition that the declared will binds the party even when the declaration does not correspond exactly to his inward intention? There are other decisions, it is true, which proceed upon a different interpretation of insurance policies.

The decisions of the Council of State illustrate an interesting application of the doctrine of the declared will. This administrative Court has held that an action to set aside a public administrative act is well founded when the plaintiff establishes that the agent, though acting within the scope of his duties, was actuated by a purpose foreign to the intention of the legislator in conferring the particular power upon the agent. Such an act is known as "abuse of power" (or "ultra vires"). But the Council of State (which has jurisdiction over such cases) has held that it may not scrutinize the inner motive of the public agent who performed the act,

When summarizing the individualistic doctrine of the autonomy of the will, I stated as my third proposition, that the act of will is protected upon condition that its "object" is lawful, and that this condition is the immediate and all-sufficient test of the law's protection to the act of will. This point is established by numerous provisions of the Napoleonic Code and the Argentine Civil Code, notably by Article 6 of the Napoleonic Code and Article 9 of the Argentine Civil Code, which contain the fundamental declarations regarding the autonomy of the will. And I may add Article 953 of the Argentine Civil Code: "The object of juridical acts must be something proper to commerce or which has not for any special reason been forbidden to be the object of juridical acts, or something which is not impossible, unlawful, contrary to good morals . . . , or prohibited by law. . . ." The negative form imparted to this text clearly shows that the one condition necessary for an act of will to produce an effect in law is that it have a lawful object.

The result was the same under the Napoleonic Code. Article 1108, it is true, requires besides an "object", that "the 'cause' of the obligation be lawful"; and Articles 1131 to 1133 are placed under the topic "Concerning 'Cause.'" Article 1131 declares that "an obligation without 'cause' or founded on a mistaken 'cause' or an unlawful 'cause' can have no effect." For a century commentators have racked their brains to know what those who drafted the Code meant by the term "cause." Classical individualists, like Planiol, declare that "cause" and "object" are the same. For example, he says that in a bilateral contract such as a sale, the thing sold and the price are respectively the "cause" and the "object" of the obligation of both the seller and of the purchaser; so in a contract of loan the "cause" is the delivery by the lender to the borrower of the thing loaned, and this thing is at the same time the "object" of the obligation of the borrower; so also in acts without consideration it is impossible to speak of "cause" at all; and, finally, in juridical acts the "object" alone is to be considered.¹

and that proof of abuse of power must appear from documents resulting from the administrative act itself. That is to say, the purpose and aim of the will which produces a legal result are determined solely by the terms of the declared will, and the judge may only consider the manifested intention of the administrative officer. Cf. *Hauriou et De Bézine*, "De la déclaration de volonté en droit administratif", appearing in "Revue trimestrielle de droit civil" (1903), p. 543; *Jèze*, "Principes généraux du droit administratif", p. 61, note 3; *Duguit*, "Traité de droit constitutionnel", Vol. I, pp. 221 *et seq.*

¹ *Planiol* writes: "The theory of 'cause' according to French doctrine possesses a double defect: 1. It is untrue in at least two cases out of

But there is now appearing, to the astonishment of our classical individualists, a body of case-law in which a new element, that of purpose and its social value, figures in the foreground. For an act of will to produce legal result it is still necessary, of course, that it have a lawful object. But that is not enough; it must be determined by a certain purpose, which must be one of social solidarity, that is to say, a purpose possessing social value according to the objective standard of social value prevailing in the particular country. This, again, is a clear consequence of the socialization of law.

Here, then, we find a new element influencing and profoundly transforming historical law. It was the eminent jurist Jhering who first showed the great importance of social purpose in law in general and particularly in modern law, both public and private.¹

three; 2. It is useless." Cf. "Droit civil", Vol. II, no. 1037. The justice of the criticism is hardly doubtful. *Planiol* proves it very clearly in a few pages. *Laurent* had anticipated him by declaring "that the doctrine of the Civil Code regarding 'cause' is not juridical . . . , and that the law was wrong in distinguishing 'cause' from 'object' and in making the former a fourth requisite for the validity of a contract." Cf. "Droit civil", Vol. XVI, no. 111. These ideas have been worked out at length in several remarkable theses submitted for the degree of Master of Law, notably by *Artur* (University of Paris, 1878); *Brissaud* (University of Bordeaux, 1879); *Timbal* (University of Toulouse, 1882); *Séfériades* (University of Paris, 1897).

At the very outset, in the doctrine of "cause" which it has seemed fit to construct upon a few provisions of the Napoleonic Code, there is a contradiction in the Code itself that destroys the whole fabric. Article 1108 names the four conditions "essential to the validity of a contract" and among these it states that the "cause of the obligation be lawful." Thus the "cause" of obligation is made an essential condition of the contract. What the Code is really talking of, then, is not the "cause" of the contract, but the "cause" of the obligation. And yet this "cause" which is declared an essential element of the obligation (and note that an obligation may spring from quite other sources than contract) would be made an element in the formation of a contract. This is not sound; yet, on this ground the battle has been waged for over a century. Clearly, we can not speak of the *final* "cause" but only of the *immediate* "cause" of an obligation, or, more exactly, of the origin of the obligation. We can only predicate final "cause" of an act of will. Now an obligation is not an act of will, but a juridical state of facts produced by an act of will and having a certain object, namely the performance of something. We can only speak, then, of the "object" of the obligation. But the declaration of will which constitutes the juridical act is, like every act of will, necessarily determined by a motive; and this actuating motive must necessarily affect the force and consequences of the declaration. The discussions and controversies of jurists will change nothing. If by "cause" we mean the motive determining the act of will, then there is such a thing and it has legal importance. But it is a poor term and productive of much confusion. We should say rather that the *end* or the *determining motive*, not of the obligation, but of the declared will, is what supports the juridical act. This is certainly what the French Courts consciously or unconsciously understand by "cause", as will be seen by the citations in *Baudry-Lacantinerie* and *Barde*, "Des obligations" (3d ed. 1905), pp. 332 *et seq.*

¹ In his celebrated work "Der Zweck im Recht" (Purpose in Law), Vol. I [translated as "Law as a Means to an End", in the Modern Legal Philosophy Series (Boston, 1914)].

I might expand at length the part which purpose plays in law and more particularly in juridical act, but I will limit myself to a few observations and examples.

What is the difference between the object and the purpose of a juridical act? The same difference as exists between the object and the purpose of an act of will. That a manifestation of the will is necessary, does not mean that the juridical act does not contain an act of will. The object of the act of will or of the juridical act is what one wishes. I wish, for example, that a certain party become my promisor with respect to a certain thing or act. That thing or act is the object of my will. The purpose, on the other hand, is the reason why I wish: the reason why I will that the particular obligation come into existence, that the particular legal state of facts arise, or that the particular party become my promisor with respect to the thing or act.

Whether or not we admit the freedom of the will (and that is a metaphysical problem which I shall carefully avoid), there is a determining motive back of every act of will, and that determining motive is precisely the purpose of the juridical act which constitutes the act of will under consideration. In distinguishing between the purpose and the object Jhering gives a simple and striking example. I desire, he says, to drink a glass of wine. My *object* is to drink a glass of wine; my *purpose* is to become intoxicated or to satisfy my thirst. Now obviously the act of will, which has the same object in each case, has a very different value according as it is determined by one or the other of these two purposes mentioned.

It would be a simple matter to show by numerous cases how modern courts, and particularly those of France, contrary to the classical doctrine, are giving more and more weight to the element of purpose in their appreciation of juridical acts. I will review a few characteristic examples.

Let us take that numerous class of contracts for the *loan of money*. According to the traditional doctrine, if the money has been paid by the loaner to the borrower the latter is bound. There is a lawful "object", and if we adhere to the Napoleonic Code and search for a "cause", we find that it exists from the moment of the transfer of possession of the money loaned. The contract is formed *over the thing*, and it is valid regardless of the purpose on the minds of the parties when they made the loan. This was the doctrine taught without discussion in the past. To-day the Courts frequently declare that if the loan was made with a purpose con-

trary to public order or good morals, for example to run a bawdy house, it would have no juridical effect.¹

Let us take another example. Article 1965 of the Napoleonic Code declares that: "No action lies for a *gambling debt* or for the payment of a wager."² But this rule clearly applies by its terms only to the gambling debt itself, and it was formerly the generally accepted view that the loan contracted to procure money for gambling purposes was perfectly valid and productive of legal result. To-day, on the contrary, it is the constant rule of the Courts that such a loan, made to procure to oneself or to others funds for gambling purposes, is invalid under the civil law. It has even been held that proof of such intention was established by the fact that the loan was made in a gambling resort or in the neighborhood of such a place, when, in the instance, it was made by those whose profession was known to be loaning money to gamblers.³

A third example is Article 900 of the Napoleonic Code, on the law of *wills*; and it has given rise to a great deal of controversy; I

¹ This was very clearly held by the French Court of Cassation in a decision of April 1, 1895, of which the following is the synopsis: "The obligation contracted by the borrower of a sum of money is null where the 'cause' (determining motive) of the loan was in the intention of both parties the acquisition of a bawdy house." *Cf. Sirey*, 1896, I. p. 289. Appert, the reporter of the case, in a critical note, shows his astonishment at the decision; he does not hesitate to declare that the Court of Cassation was wrong. *Cf. ibid.*, note, p. 289, col. 1. He does not perceive that the Court of Cassation, on the contrary, very rightly gave to the purpose, to the determining motive, the value which it should have in every juridical act under the modern conception of law. Furthermore, since 1895 the Court of Cassation has several times affirmed this decision upon similar grounds. Notably by a decision of July 17, 1905, it declared that the parties to an immoral and unlawful contract (in this case the transfer of a bawdy house), to execute which promissory notes had been signed and negotiated, had no standing in an action either for the payment of the stipulated price or for the recovery of what had been paid. *Cf. Sirey*, 1906, I, p. 188. A similar decision is that of the German Imperial Court of Jan. 21, 1903: "A contract involving a loan of money and a sale of furniture for the purpose of opening and running a bawdy house is void." *Cf. Sirey*, 1905, IV, p. 15.

² [Article 2055 of the Argentine Civil Code may be said to correspond to Article 1965 of the Napoleonic Code. It makes exceptions to the general prohibition of gaming contracts, in favor of wagers in certain classes of sports. — TRANSL.]

³ The following is the synopsis of a case decided July 4, 1892, in which the Court of Cassation very clearly laid down this rule: "An action may not be granted the party who, by loaning to a gambler, during the course of a game, funds intended for gambling and which served to assist the gambler, knowingly and intentionally aided and abetted the performance of an unlawful act which the law refuses to recognize." *Cf. Sirey*, 1892, I, p. 513, opinion of Judge Lepelletier. The classical individualists naturally disapprove of the decision. *Baudry-Lacantinerie*, in particular, says: "Is a loan valid when made to a gambler to enable him to play? It has been held that such a loan is void as having an unlawful 'cause.' We have already answered this argument when we distinguished between

have been unable to find a corresponding provision in the Argentine Code. The French text says: "In any transfer of property 'inter vivos' or by will conditions imposed which are impossible of performance or contrary to law or good morals shall be regarded as not written." This text makes no distinction between a condition and a lien, a distinction which Article 558 of the Argentine Civil Code brings out very clearly. In the case of devises accompanied by a clause importing an unlawful or immoral object, the French Courts have for a long while not hesitated under Article 900 to validate the legacy by eliminating the unlawful or immoral "cause." For example, legacies are quite common of a sum of money to the legatee upon condition that he does not marry or that he does not remarry. These were held to be absolute gifts. To-day a new and strong line of cases have been decided under which the Court must inquire in each case into the purpose or determining motive of the testator. If, for example, his intention in making the gift was to prevent a certain person from marrying or remarrying, his act was actuated by an unlawful object, perhaps even immoral, and in any case anti-social; consequently his act is declared by the Court to be without effect.¹

I regret that I cannot here work out in detail the application which the French Council of State has made of the idea of purpose in an admirable line of decisions upon the question of "abuse of power" ("ultra vires"). This Court has upon the petition of any interested party declared null any public administrative act by an administrative authority, from the President of the Republic down to the humblest agent, whenever the act, though intending something within the jurisdiction of the particular officer, is determined nevertheless by another purpose than that contemplated

'cause' and 'motive.' " Cf. "Droit civil" (10th ed., 1909), vol. II, p. 735. In spite of these criticisms the Court of Cassation has maintained its rule. Cf. Decision of July 31, 1907, affirming a decision of the Court of Appeals of Bordeaux, reported in *Sirey*, 1911, I, p. 622.

¹ To-day the Court of Cassation and the Courts of Appeal are unvarying in this rule, which may be considered, therefore, as finally established. It declares void any legacy or gift subject to a condition that is impossible, immoral, or unlawful, whenever such condition must be taken as the moving and determining "cause" of the gift. It would be better to say "determining motive"; but there is no doubt about the meaning. Cf. notably Court of Cassation, May 26, 1894, reported in *Sirey*, 1896, I, p. 129; May 8, 1901, *Sirey*, 1902, I, p. 8; June 17, 1905, *Sirey*, 1906, I, p. 174; May 9, 1905, *Sirey*, 1907, I, p. 335. The typical classical individualist, such as *Baudry-Lacantinerie*, naturally criticizes this rule too. "We have seen," he says, "that a gift can only have as 'cause' the desire to please the donee, that is to say, a generous thought; it follows that a gift can never have an unlawful 'cause.' We cannot agree, at any rate, to the reasoning of the Court." Cf. "Droit civil" (10th ed. 1910), Vol. III, p. 555.

by the law when it conferred the jurisdiction.¹ So the French Council of State has finally suppressed that entire class of acts once called discretionary, the existence of which text-writers on administrative law held as a sort of article of faith.

§ 26. **Legal States of Facts not constituting Relations between Two Subjects.** — My fourth and last proposition, derived from the principle of the autonomy of the will, was that "every juridical state of facts may be traced to relations between two subjects of right, of whom one is the passive subject and the other the active subject." If there is a tenet in the historical individualistic doctrine, it is certainly this one. Long ago Roman jurists had spoken of the "*vinculum juris*"; and now the latest writers,² still dominated by the individualistic doctrine, declare that, "While it is true that those fundamental conceptions upon which law as a science operates, as for example the conceptions of subjective right, of an active or passive subject or right, and of an object of right, have not in themselves any reality, still we must admit that in practice they are indispensable."

I have shown that under the doctrine of the autonomy of the will, which is inferred under the individualistic system, a juridical state of facts can in reality be conceived only as a relationship between two subjects. Article 944 of the Argentine Civil Code declares this expressly, as we have already seen. No doubt some individualists have maintained that the legal status of the owner, or, to use the more general term, the legal status of the person entitled to a right "*in rem*", forms an exception. It is true they say that a right "*in rem*" does not imply a relationship between two subjects of right. A party exercises such a right directly over the thing without there being any passive subject. But Planiol, whose very remarkable work was a desperate effort to save the individualistic system from ruin, did not hesitate to show that this was in absolute contradiction with the fundamental principle of the system, and that the legal status of the owner or title holder of a right "*in rem*" must, upon analysis, be regarded as a relationship between an active subject who is entitled to the right and a passive subject who is, in this case, every other person who opposes the exercise of that right.³

¹ Cf. *Duguit*, "*Traité de droit constitutionnel*", vol. I, p. 224, and the decisions and bibliography there cited.

² *Michoud*, for example in "*La théorie de la personnalité morale*" (1906), Part I, p. 10.

³ *Planiol*, "*Droit civil*", Vol. I, nos. 762 and 763. But *contra*, *Capitant*, "*Introduction à l'étude du droit civil*" (1898), pp. 39 *et seq.*

I recognize quite well that often, indeed generally, in practice, the juridical state of facts represents a relation between two persons, one of whom is bound to perform a positive or negative act, and the other of whom may require such performance. But in contemporary civilization, with its social tendencies, this is not essential. Sometimes states of facts exist requiring recognition and legal protection, although there is no relation between two subjects, and although there appears to be, and indeed, can be only an obligation imposed upon a will, without the possibility of any reciprocal right. Such a state of facts receives legal sanction because, under the hypothesis, there is an act of will moved by a purpose in harmony with social aims, and because social solidarity has a direct interest in the act. "Briefly, a state of facts productive of legal result is not a relation between two subjects; there is no need to search for the two factors in a privity that does not exist, but rather to inquire whether or not there is an act of will moved by a purpose in harmony with a specific rule of law."¹

§ 27. **Private Foundations created by Testament.** — What I have just said is no mere hypothesis. It is a reality observable in many parts of the law, notably in the law of Germany and the decisions of the French Courts relative to private funds created by testamentary devise. This is a class of cases that is becoming more and more numerous.

Let me take the simplest example. I bequeath a sum of money for the establishment of a hospital, or (as in the will of the Goncourt brothers, which a few years ago caused so much comment in France) I bequeath a certain sum to create an Academy of Belles-Lettres. There is no doubt, according to the individualistic doctrine, that such a devise is void. Classical authors like Baudry-Lacantinerie do not even trouble to argue the matter. The gift is void, first, under Section 2 of Article 906 of the Napoleonic Code, according to which, for a bequest to be valid, the beneficiary must at least have been conceived at the time of the testator's death. Now the hospital is in-existent as a person at the time of the testator's death; it cannot exist until it has been given personality by the Government, and that necessarily will be subsequent to the donor's death. Secondly, the bequest is void because it was impossible for a legal relationship to arise. Every valid legacy gives rise to a legal relationship between the testator's heir, on the one part, who becomes debtor of the legacy, and the legatee creditor on the other part. In the case considered the

¹ Cf. *Duguit*, "L'état, le droit objectif et la loi positive" (1900), p. 183.

passive (obligor) subject is clear, namely, the heir; but the active (obligee) subject is not apparent; no legatee exists.

Now such a solution of the problem (which many individualists, nevertheless, still dare to defend) is inadmissible. The testator, in the examples under consideration and in all similar ones, pursues an aim in the highest degree in harmony with social solidarity; his act of will must, therefore, be protected and guaranteed by society. In spite of the outworn rules imposing prohibitions, in spite of narrow and antiquated doctrines, the validity of such a testamentary disposition must be recognized and sanctioned at all costs. The subtleties of the conservative lawyer must be rendered ineffective and the new rule established in spite of him. It is objected: this is to create rights detached from subjects, — veritable monstrosities. My reply is that we create nothing at all; this is a rule of objective law, spontaneously springing into existence to guarantee an act of will having a social value. We create no right detached from a subject, since legal protection is accorded without conceding the notion of subjective right at all, without ever pronouncing such a word. As has already been shown, there exists neither subjective right nor a bearer subject of right.

This solution is already law in Germany. By Article 80 the German Civil Code has already provided that: "For the creation of a foundation with juristic personality, the act of the grantor of the foundation must be ratified by the State within whose territory the foundation is to have its seat. If the foundation is not to have its seat within any State, the ratification of the Federal Council is necessary." Thus the Code recognizes, or rather presupposes, the validity of funds created by will. It is true, that the personality of the fund can be recognized only by authority of the Government, but the important point is that the gift is valid; its validity is admitted as though it were made to an institution existing and possessing legal personality at the time of the testator's death.

§ 28. **Decisions of the Courts on this Subject.** — In France two very interesting lines of decisions have been handed down in this matter, one administrative, and the other judicial. In spite of existing laws and the hostility of individualists, the Courts have succeeded in validating and allowing, without restriction, the creation of private funds. I can but very briefly note here the case of the will of the Goncourt brothers, which was declared valid by the Tribunal of the Seine and the Court of Paris. They gave their fortune to create an Academy of Belles-Lettres. It was argued that the gift was void, because made to benefit a person not in

existence at the time of the testator's death. But the French Courts were not embarrassed by so obsolete an objection; they recognized the validity of the gift, and to-day the Academy exists and performs its functions.¹

The Court of Cassation came to a similar conclusion in a less celebrated case. It even went farther, since the opinion implies that the heir must see that the fund is put to its destined use, even though the Government does not intervene to confer upon it a legal personality. This decision may be said to have finally fixed the judicial law on the subject.²

¹ It has brought to light some of our now most distinguished authors, notably *Claude Farrère*, author of "*Les civilisés*" and "*La bataille*."

² The testament of Edmond de Goncourt, which was declared also to express the wishes of his brother Jules, appointed Alphonse Daudet and Léon Hennique as universal legatees, charging them to sell the property and use the proceeds to create a literary society. The society was to be composed of ten members, to each of whom was to be given an annuity of six thousand francs; a prize of from five thousand to ten thousand francs was directed to be awarded annually for a literary work. The legal heirs claimed that the gift was void because, even with the appointing intermediaries, the real legatee still was a person not in existence. The Court of Appeals of Paris, affirming a judgment of the Tribunal of the Seine of August 5, 1897, held, on March 1, 1900: "That the testamentary devise of Edmond de Goncourt is valid both in substance and form." The lower Court and the Court of Appeals decided that no one had been named as intermediary; saying, "That a bequest by the appointment of intermediaries is void only in case the party named to benefit by the testator's generosity is without capacity or unknown; that in the case under consideration Alphonse Daudet and Léon Hennique are the only legatees named." This reasoning of the Court, however, was unsound; for the person who was to benefit here was not only without capacity but did not exist. That person was the Academy, which surely did not exist when the testator died. Indeed, the Courts added: "It is no doubt true that the testator's desire is that his fortune pass to the association . . . ; that this association having no existence as yet at his death, is without capacity in the sense that it cannot receive from him; that in case it should come to be born in a legal sense, it will receive the property not from the testator, but from the legatees themselves." *Cf. Sirey*, 1905, Part II, p. 78. In reality both Courts were unconsciously applying the purpose theory. The reasons on which they founded their opinion were in absolute contradiction with the traditional principles of the Napoleonic Code.

Two years later the Court of Cassation was to go still farther. In 1900 the Court of Appeals of Paris had declared that the Goncourt Academy, a certain foundation established by devise, could not organize and act without first receiving a State permit declaring it to be of "public utility" and granting personality; the Court adding that it did not touch the question of the validity of the gift. But in 1902 the Court of Cassation went so far as to admit that a charitable institution founded by a testator could perform its functions as a private institution without receiving a permit as of "public utility." A certain Graule, a retired citizen of Finestret, in the Department of the Eastern Pyrenees, died leaving a will by which he charged his universal legatees with the foundation of an asylum for the old and poor in Finestret; he provided for the organization of the Asylum so founded. His legal heirs attacked the gift on the grounds that it had been made to an uncertain person through the appointment of intermediate agents. The Court of Appeal of Montpellier first, and later

§ 29. **Changes in the Theory of Contract.** — We proceed now to notice the changes in the conception of Contract.

The position which the contract holds in all the individualistic codes is well known, as also the place, important still, I freely admit, which in point of fact it holds in the relations of individuals, groups, and nations. But in this field, too, a profound transformation of the same nature as that which we have all along been examining, derived from the same principle and developing in the same direction, is manifesting itself. The general rule that only contract can give rise to a state of facts productive of legal result is no longer true. Alongside the contract new classes of juridical acts are making their appearance which the individualists would wrongly include by any means in their power within the old category of the contract, but which are really acts of quite a different sort, unilateral acts perhaps.

§ 30. **The Individualistic Conception of Contract.** — It was logical under the individualistic system to hold that contract alone could create a state of facts productive of legal result. If the legal status or sphere of action of each individual is based upon and measured by the will of that individual, and if every state of facts

the Court of Cassation, recognized the legality and the validity of this fund. The arguments in support of it are not very sound, because the Court of Cassation did not dare to reject all the old conceptions and face the reality. I note, however, the following: "... it cannot be held that the uses expressed in the testator's will and the provisions above mentioned constitute a mortmain prohibited by law, since they simply propose to establish a work of charity, in itself lawful and susceptible of becoming an establishment of 'public utility', but which, so long as it is not so recognized, will continue to exist as a private institution under the general law." *Sirey*, 1905, I, p. 137, and the interesting conclusions of Attorney General *Baudouin* with the note by *Lévy-Ullman*. This decision is undoubtedly of great importance, for it not only recognizes the validity of private foundations created by will, but it also decides that, even while it is not recognized as of "public utility", "the work of charity of itself lawful will subsist as a private institution." Now, in that case who will have title to property devoted to the work of charity? The truth is that the Courts have been forced to sanction and protect a gift made with a lawful purpose, without being able, try as they may, to find a subject of right.

As to foundations, cf. especially *Geouffre de Lapradelle*, "Théorie et pratique des fondations perpétuelles" (1895); *Lévy-Ullman* and *Grunbaum-Ballin*, "Essai sur les fondations par testament", published in the "Revue trimestrielle de droit civil" (1904), pp. 253 *et seq.*; *Coquet*, "Les fondations privées" (1908); *Salicrú*, Report presented to the Commission appointed by the "Société d'études législatives" for the study of the subject of foundations and published in the "Bulletin de la société" (1906), p. 467; *Larnaude*, Report upon foundations presented to the General Meeting of the "Société d'études législatives" and published in the "Bulletin de la société" (1909), p. 26; the full discussions in the different meetings of the society, *ibid.*, pp. 64, 93, 124, 237, 285, 311 and the different reports made to the Society, pp. 75, 82, 161, 172, 179, 184, 188, 267.

productive of legal result is a relation between two individuals one of whom is the active subject and the other the passive subject, it follows evidently that the meeting of their two wills is required to modify the legal sphere of action of one by increasing it or of the other by decreasing it. In a word, as every state of facts productive of legal result is a relation between two persons, it can arise only by a privity between two wills; as a state of facts of legal consequences constitutes a chain binding two persons, it necessarily represents a chain between two individual wills.

This principle stands out by very clear implication in the Napoleonic Code and all the codes based upon it. It came down from the Roman law, and has been constantly affirmed by all jurists as an unassailable doctrine. Exception was made for acts of decedents; but even in this case the heir's acceptance of the estate was needed to bind him. In acts "inter vivos" only the rarest exceptions were conceded; even in these it was impossible to deny the existence of an obligation; but, dominated by the contractual doctrine, the obligation was explained on the grounds that the facts occurred as though there had been a contract, that is to say, that the obligation arose "quasi ex contractu."

The distinguished and ardent defender of the individualistic doctrine, Planiol, whom I have already on various occasions cited, declares that there are but two sources of obligations, contracts and law.¹ Evidently under the orthodox theory this is logical; outside of contract, that is to say of the agreement of two minds to modify their respective spheres of legal action, law alone remains which, by its omnipotence, can create a state of facts productive of legal result.

§ 31. **The Roman Conception of Contract.** — The contract also received from Roman law that strong and rigid structure which has been preserved in our modern codes. Naturally the classes of contracts are no longer limited as in Roman law. Liberty of contract is now a principle; and under the Napoleonic Code² and the Argentine Civil Code³ the agreement forms the law of the parties, pro-

¹ After calling attention to the traditional opinion and to the text of the Napoleonic Code according to which five distinct sources of obligations exist, viz.: contract, quasi-contract, delict, quasi-delict, and law, *Planiol* adds: "This classification should cause no illusion; while not wholly incorrect, it is at least superficial, its terminology is inaccurate and represents the truth only indirectly. The truth is, that all obligations arise from only two sources: contract and law. . . . Where there is no contract, an obligation can have no source except the law;" "*Droit civil*", Vol. II, nos. 806, 807.

² Art. 1134, par. I.

³ Art. 1197.

vided, of course, that it have a lawful object. This manner of expressing the principle is not satisfactory, but it brings out very well the creative force of the contract. To possess this force, to be a contract, the act had to satisfy certain conditions which Roman law determined; it had to fit within the mould so rigidly constructed by Gaius, Papinian, and others, and which has been handed down intact to Dumoulin and Pothier, and to the great codifications of the nineteenth century.

This mould is the formula of the Roman "stipulation": *Spondes-ne*, Dost thou promise? *Spondeo*, I promise. To-day, of course, no sacramental words are needed; no special form is imposed. However, two individual minds must meet; one desires to promise to perform something while the other desires to benefit by that performance; the contract is born only when these two minds, after negotiation, after coming into mutual contact, have agreed over the object of the act. That is what a contract essentially is. It is an agreement over a certain object following upon the meeting of two individual wills. As is sometimes said, to form a contract, the act of will of one of the parties must be determined by the act of will of the other.¹

§ 32. **Juridical Acts which are not Contracts.** — When these various conditions do not co-exist, it can be said that there is no contract in the sense of the Roman and the individualistic systems of law. There may indeed be concurrence of wills without a contract;² and it may be termed a contract; but that is to designate different things by the same name and to cause confusion and error.

In the life of modern communities we see many instances where a state of facts productive of legal result may arise, although the source of the state of facts was not really of the character that I have just defined. This is not surprising, because the idea that the contract is the source of the state of facts productive of legal result rested upon the notion that such a state of facts always

¹ Cf. *Triepel*, "Völkerrecht und Landesrecht" (1899 *et seq.*); *Schlossmann*, "Der Vertrag" (1876); *Isay*, "Willenserklärung im Thatbestande der Rechtsgeschäft" (1899); *Dereux*, "Etude sur les diverses conceptions actuelles du contrat", in "Revue critique" (1901), p. 513, and (1902). p. 105; *Hauriou*, "Principes de droit public" (1910), pp. 159 *et seq.*; *Duguit*, "Traité de droit constitutionnel", Vol. 1, pp. 242 *et seq.*

² [By a concurrence of wills without contract is meant the manifestation of two intentions over the same object, neither intention being determined directly by the other by prior negotiation. The identity of object is a simple fact; the declarations of will are unilateral acts. Such unilateral acts are seen in subscriptions to stock, or the appointment by the government to an administrative post. *Duguit*, "Droit constitutionnel" (1911), Vol. 1, pp. 242 *et seq.*, pp. 469 *et seq.* — TRANSL.]

constitutes a relation between two wills. The moment that we recognize that a state of facts may produce a legal result without possessing this character, we necessarily admit that such a state of facts can arise from *other sources than a contract*, in the sense in which that word is used in the individualistic system of law.

But most jurists are dominated by the orthodox conception; instead of seeing in all these acts new legal instrumentalities, unknown to the individualistic system of law, instead of analyzing their novel character, they have preferred to squeeze them at all costs into the old narrow mould of the contract. As in the case of collective personality, they have put forth prodigious efforts of scholastic subtlety to prove that all these new acts are in reality traceable to contracts. Of course they failed. Success was impossible; they could not prove that something that was not really a contract was one. Besides, have they not admitted the truth by adding qualifying terms to the word contract, — terms which obviously would have been needless if the act really were a contract? They speak of conduct indicative of assent and “equivalent to a contract”, “gate contracts”, “collective contracts”, “contracts of collaboration”; none of these is a contract at all.

§ 33. **Conduct Equivalent to Contract.** — The simplest example of what many jurists term conduct indicative of assent and equivalent to a contract¹ is the familiar automatic slot-machine. A manufacturer or an administrative bureau of the Government, by placing a mechanical distributor of this kind in a public place, creates a state of facts whereby any person placing in the machine the required piece of money becomes creditor of the object advertised on the machine or of the repayment of his money. It is

¹ “Contrat d’adhésion.” Upon such contracts, *cf.* especially: *Dereux*, “Revue trimestrielle de droit civil” (1910), pp. 503 *et seq.* (Dereux makes a distinction which I do not particularly favor, viz., between essential and accessory clauses.) *Cf.* also *Portier*, “Des pouvoirs du juge en matière de contrat d’adhésion” (1909, thesis, University of Dijon); *Hauriou*, “Notes” under title “Conseil d’État”, Chauvin’s Case, March 23, 1906, reported in *Sirey* (1908), III, p. 17, and the case of the Compagnie Générale Transatlantique, May 17, 1907, reported in *Sirey*, 1908, III, p. 137. *Hauriou* says very justly: “A subscription contract (‘contrat d’abonnement’) is simply conduct indicative of assent and equivalent to a contract; perhaps, indeed, it would be better to suppress the word contract and call it an act of assent to an organized public service. . . . Acts of assent have nothing contractual about them though they may be called contracts; they are simply acts of assent to existing regulations”; *cf.* *Sirey*, 1908, III, p. 18, col. 3, and p. 19, col. 3; *cf.* also *Salicrutes*, “De la déclaration de volonté” (1901), p. 230; *Dollat*, “Les contrats d’adhésion”, pp. 133 *et seq.*; note by *Bourcart* to decision of the Court of Cassation, January 4, 1910, *Sirey*, 1911, I, p. 521, where he calls conduct indicative of assent a pseudo-contract.

claimed that this is a contract by "conduct indicative of assent", because the party using the machine indicates by his conduct his assent to a certain state of facts and this assent constitutes a contract.

I do not dispute the fact that there really is conduct indicative of assent to a certain state of facts. But I do maintain that it is incorrect to try to trace this act to the classic contract. We do not find here two wills in one another's presence, meeting and agreeing. The two wills are wholly unknown to each other, and do not dictate by any common accord the terms of the alleged contract. There is one will which has given rise to a state of fact not isolated and transient but general and permanent in its nature; and another will desirous of profiting by that state of fact. In reality what appears to be a subjective right springs out of a unilateral will. The party aims to do a juridical act, and, by using the mechanism, executes his desire lawfully and effectively, because it conforms to a state of fact recognized as lawful. I see no meeting of minds; I see only a unilateral declaration of will.

§ 34. **Acts of Use of a Public Service.**—The same may be said, though perhaps more positively, of the act of the individual who, desiring to make use of a public service, pays the charge fixed by law for the service. The most typical example is that of stamping and posting a letter. The individualist tells us that these acts create a contract of carriage between the State, as carrier, and the sender, and that this contract is to be governed by the ordinary rules of law covering the contract of carriage. This seems to me to be a wholly incorrect way of analyzing the situation. There is no contract, but a unilateral act on the part of the sender alone. The law organizing the public service has created such a legal situation as enables any individual to will with legal effect. Merely by paying a sum fixed by the organic law of the service he may will that an object shall be transported from one place to another. There is discoverable here simply a lawful line of conduct; by mailing the letter the sender willed according to law, that is, conformably with the law regulating the public service; his act of will must be protected. Is it not a strange sort of contract where the parties are bound in advance and unable to fix the terms of their contract? But the situation is explained if we regarded it as a unilateral act, productive of result because done agreeably to the law of the public service.¹

¹ Cf., *contra*, Gény, "Des droits sur les lettres missives" (1911), I, p. 52, who after a long discussion concludes without hesitation "that this situation is governed as a matter of principle and as a matter of law as a true contract." I think that I had already answered this view in an article

These are not mere subtleties of argument, nor considerations of a purely theoretic nature. But even were they such, it would be of moment to throw light upon these points, for it has been said, and rightly, that it is always highly important to have one's ideas theoretically sound. But the practical interest is apparent. If a contract to carry exists, the liability of the State as a carrier will have to be tested by the common rules governing the contract of transport; the problem is purely contractual. But if there is simply the unilateral act of a member of the public who desires to use, in accordance with the law, a public service operated in the interests of all, we face a different problem, that of liability of a public service towards private individuals, and the solution will depend upon quite a different order of ideas. I greatly regret that I can not discuss them here.

§ 35. **Acts constituting so-called Collective Contracts.** — The most interesting new act which is making its appearance in modern juridical relations is what has been very inexactly termed the "collective contract." The expression contains in itself a contradiction. The contract is by nature and by definition essentially individualistic. I showed that this was true earlier in our inquiry. The character of the contract and of the group are exclusive of one another. Jurists aggravate their mistake of giving this act the name of collective contract by their desire to force it at all costs within the traditional contractual mould.

Two years ago the "Société d'Études Législatives", which counts among its members the most learned men in the law in France, wished to draft an act to govern the collective contract of labor, which might serve as a guide to the Chambers when they desired to legislate on the subject. A committee prepared a law directly inspired by the general principles of the civil law of contracts. Its labors were without enduring result, and the very just criticism was made that the incurable defect of the bill was to relate this new form of juridical act to the old form of contract, when, in fact, it presented a wholly different character. The draft of the Committee fell through in debate.¹

contributed to the "*Revue du droit public*" (1907), pp. 411 *et seq.*; in a contribution to the meeting of the Congress of the Administrative Sciences, held in Brussels in 1910; and in my "*Traité de droit constitutionnel*", Vol. I, p. 106. Besides the notes by *Hauriou* cited in the preceding note, cf. *Jèze*, "*Revue du droit public*" (1909), p. 48. Upon the same question, with regard to the parcel post, cf. two decisions of the Court of Appeals of Bordeaux, July 8, 1909, *Sirey*, 1911, Part II, p. 233, and the very interesting note by *Ferron*.

¹ Cf. the reports made to the "Société d'études législatives" by *Colson* in the "*Bulletin*" (1907), pp. 180 and 505; the notes by *Morin* and

If I were to name these acts, incorrectly called collective contracts, I would say that they were "compacts equivalent to laws." Let me explain.

§ 36. **Concession to Operate a Public Service.** — In modern societies the collective contract is exemplified in two classes of acts; the concession to operate a public service, and the so-called collective contract of labor.

A concession is in general an act by which a community, the State, county, or municipality, charges a private party, usually a company (who accepts the charge), with the obligation of providing, subject to fixed conditions, a certain service to the public. Aside from differences in detail, such acts are met with in all modern countries, and they possess the same general essential character. Nowadays they are granted chiefly to provide the public with the means of transportation by steam railways, street railways, omnibus lines, and also to supply gas and electricity for lighting cities.

Concessions are certainly contracts. They contain an element in the strictest sense contractual, namely, those provisions governing solely the relations between the community, as grantor, and the grantee, for example the terms relating to the consideration of the grant. But concessions also contain, — and, in fact, these form the most important element — a series of provisions affecting third parties, the public. Such are, for example, all those provisions which determine the conditions upon which the concession is to be worked: the scale of prices, the conditions of labor of the employees of the grantee. The latter class of provision is found in many of the contracts granting such concessions in Europe. In France, under the Millerand Decree of August 10, 1899, they must be inserted in all transactions concluded by the State.

What is the character of these clauses? Lawyers of the individualistic school have been much embarrassed to determine. Such provisions directly affect persons who are strangers to the contract: the public, passengers, consumers of gas and electricity, employees; clearly these persons are not privy to the so-called contract which grants the concession. Now it is a principle of the law of contracts that they only affect the contracting parties, that is, that they neither harm nor benefit third parties. The Napoleonic Code in Article 1165 is explicit; Articles 1195 and 1199 of the Argentine Civil Code are equally so. The last deserves quoting: "Contracts may not be pleaded against third parties nor in their

Barthélemy-Reynaud, ibid. (1907), pp. 208 and 421; *Saieilles, ibid.* (1908), p. 79; the discussion *ibid.* (1907), pp. 532 *et seq.*; (1908), pp. 82 *et seq.*

behalf except in the cases provided for by Articles 1161 and 1162." It is precisely upon these exceptions and the analogous ones contained in Articles 1120 and 1121 of the Napoleonic Code governing promises for the benefit of third parties, that the individualists have relied to explain this class of provision in concessions. Broadly speaking, these Articles permit a stipulation for the benefit of a third party and declare it enforceable if the third party has accepted it. These articles serve to explain nothing to me, and indeed, are absolutely irrelevant to the question of concessions. They permit, it is true, the insertion in a contract of a special clause having a determined and precise object and creating a right or duty in a third party, if he assents to it. But that is not what takes place in the grant of a concession. That part interesting third parties contains no special clause benefiting or charging a particular person; it usually contains a series of regulations which establish in advance the status of the grantee and employees on the one hand, and the grantee and the public who use the service on the other. There is no stipulation either benefiting or charging a third party in the case; there is simply the text of a set of regulations which are to be applied subsequently to a series of isolated acts.

Now, whether you will or not, such regulations are simply a law. They are of a general nature and that is the true quality of a law. By this means the law which is to govern the public service is established contractually. The general law of contracts can not be applied; it has, in fact, been replaced by a new law. General contract law was intended to regulate the relations between individuals. Here we are in the presence of an act regulating the management of a public service. The difference must be admitted.

The consequences of this change in theory have great practical importance; but I can not consider them here.¹ They are, briefly, that in case the grantee or the governmental administrative agent does not respect the provisions relating to third parties, such third party, be he a mere member of the public, or an employee, shall be armed with all those legal means of compulsion which, in the country under consideration, belong to parties who are privy to a contract, for the enforcement of the rules governing the operation of the public service.²

¹ I tried to show the main consequences in a contribution to the "Congrès des sciences administratives", which met in Brussels in August, 1910.

² For the character of concessions to operate a public service and their effects, cf.: *Duguít*, "Revue du droit public" (1907), p. 411; *Jèze*, *ibid.* (1909), p. 49 and (1910), p. 270; *Rolland*, *ibid.* (1909), p. 520; opinion by *Tardieu*, decision of the Council of State, Dec. 6, 1907, in the case of

§ 37. **So-called Collective Contracts of Labor.** — The collective contract of labor appears under somewhat different conditions of fact. Its legal nature is, however, analogous to that of the concession. I doubt whether there are many examples of this contract in the Argentine Republic. In England and France it is often employed; indeed, so important is it that the French Ministry has reported two bills on the subject to the Chamber of Deputies;¹ though in my opinion the time is not yet ripe to legislate on the subject.

The most frequent source of this collective contract is the labor strike. Let us suppose that a strike of masons is declared, and that it ends when an understanding is reached between the organized employers of masons and the masons' union. By this understanding it is agreed that henceforth, in the particular locality, the individual contracts of employment of masons, in so far as salary, hours of labor, etc. are concerned, shall be made to conform with the conditions fixed by the understanding. It can not be doubted that such an agreement is lawful. Its object is lawful; it is determined by a purpose in harmony with social solidarity, if ever such a purpose existed. What will be the effect of such an agreement? I see but this: if an employee hires workmen upon other terms than those stipulated in the collective contract of labor, the individual contract of employment will be void.

But who may seek the cancellation of the individual contract? And when? Let us suppose an employer hires a workman who was not a member of the union when the understanding was reached, that is to say, when the collective contract was entered into, or who has resigned from membership since that time. Is the individual contract of employment with such a workman void because it does not conform to the collective contract? If an employer, once a member of the employers' organization which was a party to the

"Grandes Compagnies de chemin de fer", reported in "Recueil", p. 913 and *Sirey*, 1908, Part III, p. 1; opinion by *Blum*, decision of the Council of State, March 11, 1910, in the case of "Compagnie des Tramways de Marseilles", reported in "Recueil", p. 97, and "Revue du droit public", 1910, p. 270, with the interesting article by *Jèze*, already cited, upon the legal nature of the grant of a concession to construct a public work.

¹ The bills were submitted by *Doumergue*, Minister of Commerce, July 7, 1906, and by the *Briand* ministry, July 11, 1910. Upon the collective contract of labor cf. *Truchu*, "Revue d'économie politique" (1905), p. 858; *Jay*, *ibid.* (1907), pp. 531 and 649; *Nast*, "Des conventions collectives relatives à l'organisation du travail" (thesis, 1907); *Passama*, "Les conventions collectives relatives aux conditions du travail" (1908); *Barthélémy-Reynaud*, "Le contrat collectif de travail" (thesis, 1901); and the reports and discussions of the "Société d'études législatives", *supra*, p. 71, note I, particularly the reports by *Colson*.

collective contract, withdraws from such organization, is he still bound by this contract? Can the workman individually demand the cancellation of his contract of employment when its terms violate the collective contract, or may the union alone do this? Or must the organization of employers join?

These are some of the important and delicate problems presented. To answer them, the individualistic school (anxious, at all costs, to maintain the orthodox conception of the contract) has found no better means than to introduce the principle of agency. In the grant of a concession to operate a public service it invoked the stipulation for the benefit of a third party. As that was impossible in collective contracts of labor, it fell back upon agency. The collective contract, says the individualist, is entered into between two organizations; it can affect only those who may be regarded as having given tacit power to their organization to speak for them. Consequently the collective contract can produce no effect upon the situation of those workmen or employers who did not belong to their respective organizations when the collective contract was closed. Furthermore, a power is by nature always revocable; no one is obliged to remain a member of his organization. Employers and workmen are, therefore, always free to withdraw and to terminate the effect of the collective contract upon themselves. That is saying that the collective contract ceases to produce consequences as to them.

This was the theory adopted by the "Société d'Études Législatives", which I mentioned above. This learned body discussed the difficulties and contradictions, and discovered, as it was bound to do, that there was no solution.

§ 38. **Compacts Equivalent to Laws.** — The collective contract is a class of juridical act that is quite new and altogether foreign to the orthodox moulds of the individualistic system. It is a "compact equivalent to a law", which regulates the relations of two groups of society. It is not a contract giving rise to special, specific, and transient obligations between two subjects of right. It is a law establishing permanent and lasting relations between two groups of society: it fixes the legal conditions which are to enter into the individual contracts concluded between members of the two groups. This is the true point of view; it solves the difficulty and presents a basis upon which the law of the so-called collective contract may be constructed.

I readily admit that even in France, Germany, and England this part of the law is still in process of development and far from

crystallization. As a legal conception it assumes that the different working classes have definitely organized according to law, and that each industry has formed a union strong and comprehensive enough for it and the whole body of workmen of that class to be co-extensive and for the isolated employer and laborer to be considered negligible quantities. In my opinion many European countries are moving towards such a social and industrial state. But they are, perhaps, still far from their goal. Meanwhile, the collective contract of labor remains unfinished and rough hewn. But such as it is — and this is the important point — it certainly exists entirely outside the old mould of the contract.

Collective contracts raise a question of public law of great moment; I can advert to it only in passing. I have just spoken of compacts equivalent to laws; but are not compact and law two notions exclusive of one another? Is not law the rule emanating from the sovereign authority and imposed as such upon the subjects of that authority? It used to be so defined; but it is no longer that, or not exclusively that in every case. In modern public law an evolution is taking place corresponding to that in private law. As the autonomy of the individual is disappearing, so the sovereignty of the State is disappearing. As subjective right in the individual, exemplified in its most intense form by "dominium", is disappearing, so the subjective right in the State, the "imperium", is disappearing. There is no longer any reason why one source of law should not be those rules of conduct established by a compact between groups of society and sanctioned by the material forces of government.¹

V. THE NEW CONCEPTION OF LIABILITY FOR AN INJURIOUS ACT

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| § 39. The Individualistic Principle of Liability. | | only to Groups. |
| § 40. Subjective Liability for an Injurious Act and Objective Liability for Risk. | | § 42. Liability for Injuries to Workmen. |
| § 41. Objective Liability attaches | | § 43. Liability for Injury in Public Service. |
| | | |

§ 39. **The Individualistic Principle of Liability.** — But little time is left me to treat the great and serious problem of liability. I

¹ Cf. *Duquitt*, "Le droit social, le droit individuel et la transformation de l'État" (2d ed. 1911, F. Alcan); "Traité de droit constitutionnel" (1911), Vol. I, pp. 67 *et seq.* [The former of these works, expounding the notable philosophy of the present author, is in part translated in Vol. VII of the Modern Legal Philosophy Series, "Modern French Legal Philosophy" (Boston, 1916). — Ed.]

shall try to cover the essential points and to show how in this, as in all parts of the law, an evolution of a social nature is still going on.

The individualistic principle of liability is expressed in Article 1382 of the Napoleonic Code: "Any act by which a person causes damage to another binds the person by whose fault the damage occurred to repair such damage." Almost the same words are found in Article 1109 of the Argentine Code: "Whoever does an act, which by his fault or negligence causes damage to another, is bound to repair the damage. . . ."

§ 40. **Subjective Liability for an Injurious Act and Objective Liability for Risk.** — The rule is very simple and very consistent with the whole structure of the individualistic system.

In the relations between two subjects of right an obligation can only arise out of contract. But if a wrongful or negligent act can be imputed to a party, this imputation raises an obligation in him to repair the injury which he has caused to the subject of right. The party who alleges the injury must, therefore, prove the wrong or negligence of the actor. In the last analysis it is still the will of the subject of the right which is the generating cause of the legal relation between the parties. In this system it is invariably the principle of moral imputation that is the sole basis of both the civil and the criminal liability of the subject of right. Hence the system has been named that of subjective liability.

I do not pretend that subjective liability has disappeared or should disappear completely; in the relations between individuals it continues and no doubt will continue for a long time to come. I do claim that the domain of subjective liability is narrowing and that imputation can no longer be the criterion of liability where the question is not one arising between individuals, but between groups or between groups and individuals. And it is not to be denied that there very often does exist in fact a relation between groups or between groups and individuals when there appear to be only isolated relations between individuals. In that case it is not a question of imputation, but simply a question of risk. The problem is to determine what interests should ultimately support the risks attached to the activity of the group under consideration. When the problem is so viewed there can arise an objective responsibility, something distinct from subjective responsibility. To determine whether liability exists, we no longer inquire whether a wrongful or negligent act has been committed, but simply which group must eventually support the risk. The only proof is the

damage caused; once this is established, liability results, automatically, as it were.

§ 41. **Objective Liability attaches only to Groups.** — It is easy to see how this sort of liability has been a consequence of the socialization of law. When those acts of a man's life to which legal results attached were viewed simply as relations between individual and individual, and when all acts interesting society were derived from the autonomy of the individual will, it was impossible to imagine the rise of an obligation save as the product of the will. The bearer of subject of right wills conformably to law: he, thereby, becomes a creditor or a debtor; he wills contrary to law; he is made liable and becomes a debtor to the extent of the damage caused.

But to-day the life of the community and, therefore, life as it is reflected in the law, is the product of a division of labor into activities of the individual and activities of groups. Groups are not, as we have seen, subjects of will; liability cannot be imputed to them. But group activity is none the less an important element of social activity. The labor which the group performs no doubt benefits society as a whole, but its more immediate benefit redounds to the members of the group. If the latter reaps the proximate benefit, it is fair that it support the risk to which the exercise of that activity subjects individuals and other groups.

This is the very simple conception upon which hang all the cases of objective liability.¹

It would be interesting to study in detail the examples of objective liability to be found in modern statutes and cases. I cannot do more than refer to the two most important instances, those of liability for accidents to workmen and of liability for injury in a public service.

§ 42. **Liability for Injuries to Workmen.** — The Act of April 9, 1898, relating to accidents to workmen, as completed and expanded by the Act of April 12, 1906, is the first law in France to create an express instance of objective liability. It already existed in certain countries, notably England and Germany. Before the passing of this law, an effort had been made in France by text writers and Courts to prepare the ground for the Act by shifting the burden of proof. The employer was declared to be always

¹ [For the history of this doctrine of objective liability in Anglo-American law, see *Holmes*, "The Common Law", pp. 92, 144; *Wigmore*, "Responsibility for Tortious Acts", *Harvard Law Rev.*, VII, 315, 383, 442; *Ames*, "Law and Morals", *ibid.*, XXII, 97. — Ed.]

liable for the accident unless he proved that fault was imputable to the workman. They tried to justify their doctrine by torturing the sense of several provisions of the Napoleonic Code, especially Articles 1384 and following.¹ Finally, the Act of 1898 created a complete system of objective liability. You are of course already acquainted with the principle: when a workman is injured while at work or by reason of his employment, the employer owes him damages, which are fixed by law upon the basis of his salary. The workman has merely to establish the fact of the accident; the employer cannot excuse himself by proving that there was negligence or want of skill on the part of the workman, he can only escape liability by showing that the workman injured himself intentionally.

The individualistic school is still active in its criticism of the system. Obviously it is wholly repugnant to individualistic principles. But the spread of the system is one of the best proofs of the defeat of individualism. If we consider in industrial concerns only the isolated relation between employer and employee, evidently there can arise against the employer merely a subjective liability for a wrongful act. The only question that might, perhaps, be raised would be whether the liability were "ex contractu" or "ex delicto." But in modern industrial communities this is no longer the situation. Industrial establishments have acquired a social importance; the employer exercises truly a social function. In reality two social elements are brought face to face: capital and labor. The whole problem is to determine which of these two elements ought to support the risks of the enterprise or whether it ought to be supported by them both; and lastly, whether an accident to an employee, or his death, constitutes a part of that risk. As the element of capital, apparently at least, enjoys all the profits of the enterprise, the conclusion has followed that this is the element which ought to support all the risks and which consequently is liable for accidents. But this liability is one in which the element of imputation is entirely foreign.

But can it be truthfully said that capital alone benefits by the enterprise? Is not the element of labor in reality always a participant in the profits? Is the employee not destined to be associated more and more in the profits? Would it not conform more

¹ Cf. particularly *Josserand*, "De la responsabilité du fait des choses inanimées" (1897); *Salicrú*, "Les accidents du travail et la responsabilité civile", from the "Revue bourguignonne de l'enseignement supérieur" (1894), pp. 655 *et seq.*

with the trend of modern social evolution to place the risk upon capital and labor in common, though perhaps not equally? In any case, should not enterprises be at once distinguished according as the employee is or is not in fact associated in the advantages of his employment by participating in the profits? These are problems of political economy that I would indicate, but cannot here discuss.

To the liability for injuries to workmen should be assimilated the objective liability recognized many times by the Courts for *damage caused by things*, rather than by persons. The Courts hold that the owner must repair the damage caused by the thing belonging to him unless he establishes the fault of the injured party. Property here ceases to be a right and becomes a social function, as I shall try to demonstrate in the following chapter. As the owner enjoys the benefit of his health, he it is who should support the risk of the damage occasioned by it.¹

§ 43. **Liability for Injury in Public Service.** — Lastly, objective liability appears very clearly in what I call, by way of abbreviation, liability for injury in a public service. It should be called the liability of the public treasury by reason of facts arising in the operation of a public service. The decisions of the French Council of State have established a doctrine in this matter that is essentially protective of the public who enjoy the service and which is certainly more progressive than any existing in foreign countries. It is impossible for me to go into it here; I would have to develop the whole theory of a public service, and that would be outside my program. It must suffice to say that the French doctrine is based entirely upon the idea that the public treasury must support the risks to the individual which attend the operation of a public service; that the Council of State no longer obliges the individual to prove that actual fault is chargeable to the agents of the public service; that liability attaches, no matter what the class of public service, since the old distinction between a public service that was responsible for its management and a public service that was not, has been definitely abandoned; and lastly, that the Council of State admits of liability to-day even for police acts.²

¹ A complete bibliography and analysis of the decisions of the Courts will be found in *Baudry-Lacantinerie* and *Barde*, "Traité des obligations" (3d ed. 1908), Vol. IV, pp. 684 *et seq.* Cf. notably the decisions of the Court of Cassation, March 29, 1897, *Sirey*, 1898, I, p. 70 and the note by *Esmein*; Jan. 22, 1908, reported in *Dalloz*, 1908, I, p. 217 and the note by *Josserand*; March 25, 1908, *Sirey*, 1910, I, p. 17 and the note by *Esmein*.

² Cf. *Duquait*, "Traité de droit constitutionnel", Vol. I, pp. 253 *et seq.*, and the bibliography and cases there cited, especially *Teissier*, "De la

VI. THE NEW CONCEPTION OF PROPERTY AS A SOCIAL
FUNCTION

§ 44. Property conceived as Sub- jective Right and as Social Function.	§ 49. The Obligation to Cultivate Land.
§ 45. General Economic Need met by the Legal Theory of Property.	§ 50. The Tax on Unearned In- crement.
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§ 44. **Property ceasing to be a Subjective Right of the Owner, and becoming a Social Function of the Possessor.** — The classical jurists will, perhaps, find a contradiction in the title “Property as a Function.” They believe that of itself and by definition property is a determinate thing in the law; that it is necessarily and always that determinate thing, and that, if it ceased to be so, it would no longer be property. I have already expressed my opinion of this “a priori” and dogmatic method of viewing the law; if I call it again to your attention it is because that method has asserted itself and is still asserting itself in the law of property more than in any other field.

It is not denied that property grew up in the law to answer an economic need (as indeed is true of all law) and that it necessarily is developing along with those economic needs. But in modern communities the economic need which was answered by the law of property is undergoing a profound alteration. Here, too, the evolution is in a social sense; its direction is being determined by an ever-stricter interdependence of the various elements that compose the social community. In this way property is *socialized*, if I may use the term. That does not mean that it is becoming *collective* in the economic sense. It means two things: first, that private ownership is ceasing to be a private right and becoming a social function; and second, that those instances of the applica-

responsabilité de l'État”, in “Répertoire de droit administratif”; *Tirard*, “La responsabilité de la puissance publique” (1905); *Marcq*, “La responsabilité de la puissance publique” (1911); *Michoud*, “Théorie de la personnalité morale” (1909), Part II, pp. 260 *et seq.*; the following decisions of the French Council of State: Feb. 10, 1905, case of *Tomaso Greco*, reported in the “Recueil”, p. 140 and in *Sirey*, 1905, III, p. 113, with the interesting opinion of *Romieu* and a note by *Hauriou*; Dec. 24, 1909; case of *Pluchard*, reported in the “Recueil”, p. 1029, and in the “Revue du droit public” (1910), p. 83, with a note by *Jèze*.

tion of wealth to collective uses which should be legally protected, are becoming more and more numerous.¹

I should add an important limitation. In my inquiry I shall consider exclusively what economists call capitalistic property, and not property in objects destined for consumption. The latter presents an altogether different character, and it would not be true to say that it is undergoing a social evolution. As to capitalistic property, however, I shall speak of all classes, personality as well as realty. In both these classes the evolution is the same. It appears, however, in perhaps a more striking manner in the case of realty and for that reason it shall serve as my example.

In the Argentine Republic, the evolution of property is certainly not so far advanced as in Europe, above all that of rights in land. Perhaps I might characterize the point to which the Argentine law has at present reached as the stage of ownership-as-a-speculation; but it will be followed, perhaps at a not far distant period, by the state of ownership-as-a-function; since the evolution of nations, particularly of Latin nations that have reached a like plane of civilization, is similar.

§ 45. General Economic Need met by the Legal Theory of Property. — To what economic need did the law of property in a general way answer? A very simple need and one apparent in every society: the need of applying certain wealth to definite individual or collective uses, and consequently the necessity that society guarantee and protect that application. What is required to accomplish this? Two things: first, as a general rule, every act which conforms with one of these uses must be sanctioned; and second, all acts contrary to them must be restrained by society.

The social instrumentality developed to attain this double end is property, in the legal sense of the word. To ask what is the legal conception of property, is to inquire what the conception is on which rests that social instrumentality whose object is to protect the application of wealth to individual or collective uses, sanctioning acts done in accordance with this purpose and restraining acts done contrary to them.

§ 46. Property under the Individualistic System. — How have the codes founded on the individualistic principle developed this

¹ The evolution which I propose to describe, is, I think, much less advanced in the countries of South America than of Europe, particularly France and England. I shall speak from the French point of view. [See the work of *Ely*, "Property and Contract in their Relation to the Distribution of Wealth" (2 vols., N. Y., 1914), for a full discussion of the theory of property as a social function. — Ed.]

social instrumentality? Very simply. In the first place, those who drafted the codes were not concerned with inquiring into the legality of property rights then in fact existing, nor with determining on what they were founded. They accepted existing facts and declared them inviolable. Furthermore, being profoundly individualistic, they had in mind only the application of wealth to individual ends, for this is the very fulfilment, the very cornerstone, as it were, of individual autonomy. They did not, and have not since, been able to understand anything but a *protection* thrown about the individualistic use of property. They believed that the only way of protecting such a use was to endow the holder with a subjective right, absolute in duration and in effect. The right attached to the thing appropriated, and the duty corresponding to this right rested on all persons other than the owner of the thing. In a word, they adopted the rigid legal construction of the Roman "dominium."

The declarations of principles which created this system are well known; I have already quoted them. Article 17 of the "Declaration of the Rights of Man" of 1789 begins: "Property being a sacred and inviolable right", etc.; Article 17 of the Argentine Constitution declares that: "Property is inviolable . . . ;" Article 544 of the Napoleonic Code gives this definition: "Property is the right of enjoying an object in the most absolute manner, etc.;" Article 2506 of the Argentine Civil Code is still more explicit: "Property is the right 'in rem' by which a thing is subjected to the will and the acts of a person." This last definition is completed by Article 2508 which declares that: "The right of property is exclusive. Two persons may not each have the right of ownership to the whole thing. . . ."

These texts illustrate very well the absolute and exclusive quality of property, and the idea of ownership as a right, which is a part of the individualistic conception. The right of property is the perfect manifestation of the autonomy of the human will, and of the sovereignty of the individual, just as the legislative authority is the perfect manifestation of the sovereignty of the State. And, indeed, "dominium" and "imperium" are two legal conceptions from the same source that always move parallel.¹

§ 47. **Consequences Rejected To-day.** — The consequences of the conception of property as a right are well known; it will be well, however, to recall the principal ones.

¹ Cf. *Duguit*, "Le droit social, le droit individuel" (2d ed. 1911), pp. 17 *et seq.*

In the first place, the owner, having the right to use, benefit by, and to dispose of the thing which is the object of his ownership, has, for like reasons, the right *not to use it*, not to derive benefit from, and not to dispose of it; consequently to leave his lands uncultivated, his city lots unimproved, his houses untenanted and unrepaired, his capital consisting of personal property unproductive.

The right of property is *absolute*. It is absolute even as against public authority, which can, indeed, place upon it certain restrictions of a police nature, but cannot lay hands upon it, save after paying a just indemnity. It is absolute in so far as it affects individuals and, in the words of Baudry-Lacantinerie, the owner "may lawfully perform upon the object of his ownership acts even though he have no demonstrable interest in performing them", and if in so doing he injures another party, "he is not liable, because he is but acting within his right."¹

The right of ownership is also absolute *in duration*. Upon this attribute is based the right of transmitting property by will, because the owner or title-holder of an absolute right has, logically the power of disposing of his property both during his life and also for a time after his death.

It is easy to show that as a matter of fact none of these consequences represents the truth; at least in certain countries, notably in France. To be less categorical, I will say that the entire individualistic system of property law is disappearing. This assertion is not unfounded; it is based upon a direct observation of facts, for both in statutory and in case-law there is appearing a body of principles directly opposed to the consequences of the individualistic system. Is this not proof that the legal system from which those consequences spring is breaking down and disappearing?

The general causes of this disappearance are again those that we have studied above, which are determining the direction of the general transformation of individualistic institutions.

First, property, as a subjective right, is a purely *metaphysical*

¹ Baudry-Lacantinerie, "Droit civil" (10th ed., 1908), Vol. I, No. 1296, p. 726. I should, however, add that this statement is not found in the 11th ed. published in collaboration with Chenuaux (1912), No. 1296, p. 738. But Chenuaux declares that the owner "enjoys the object as he pleases and, if he desires, in an abusive manner." Baudry's collaborators have been far less categorical regarding property as an absolute right. Chauveau, "Des biens", No. 215, writes: "In spite of its absolute character, ownership must still be circumscribed within reasonable limits." Barde, "Des obligations", Vol. IV, no. 2855, p. 342, says: "The truth is that there is no absolute right and that ownership itself is not an absolute right but subject to limitations."

conception, in radical opposition to modern positivism. To say that the possessor of capital has a right over it, is equivalent to saying that he has a power, of itself superior to, and prescribable upon, the will of other individuals. The "dominium" of the individual is no more intelligible as a right than the "imperium" of the Government as the seat of force.

Furthermore, the individualistic system of property is breaking down because it tends to protect *individual uses alone*, which are considered as sufficient in themselves. The system reflected perfectly the individualistic conception of the society of the period. It found a perfect medium of expression in Article 2 of the "Declaration of Rights of Man" of 1789: "The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are: liberty, property, security, and resistance to oppression." If the application of wealth to private uses was protected, it was solely out of consideration of the individual; it was solely the utility to the individual that was kept in view. To-day there is a very clear sense abroad that the individual is not the end but the means; that the individual is only a wheel of a huge mechanism, the body social; and that his only reason to exist is the part which he performs in the labor of society. The individualistic system is seen, therefore, to be in open opposition to the temper of the modern conscience.

Finally, the individualistic system of property is vanishing because it was developed solely to protect the application of wealth to individual interests, and therefore was useless in protecting its application to *collective purposes*. This reason also involves the problem of collective personality which we have already studied.

§ 48. **The Owner's Obligations.** — Such is the basis of the new conception of property. In modern life, where a deep and well-defined consciousness of social interdependence has become dominant, liberty has been transformed into a duty of the individual to employ his physical, intellectual, and moral forces to enrich this interdependence. In just the same way property has become for its possessor an objective duty or obligation to employ his wealth to support and enlarge social interdependence.

Every individual is under an obligation to perform a certain function in the community, determined directly by the station which he occupies in it. The possessor of wealth, by reason simply of his possession, is enabled thereby to accomplish a certain work where others can not. He alone can increase the general stock of

wealth by putting his capital to use. For social reasons he is under a duty, therefore, to perform this work and society will protect his acts only if he accomplishes it and in the measure in which he accomplishes it. Property is no longer a subjective right of the owner; it is the social function of the possessor of wealth.

Again, it was Auguste Comte who in the 1800's first gave prominence to this idea. In 1850 he wrote "In any normal phase of human history, each citizen really is a public officer, whose functions, more or less clearly defined as the case may be, determine both his obligations and his powers. This universal principle should certainly be extended to property; for property is preëminently a field where positivism discovers an indispensable social function, namely, to procure and administer the capital by which each generation prepares the work of the succeeding generation. Wisely understood, this normal view of the use of wealth ennobles it without curtailing any reasonable liberty as to its exercise; indeed it even increases respect for it."¹ To-day, be it noted, the most ardent defenders of individual ownership, the extreme orthodox economists, are themselves obliged to admit that, if the application of wealth to individual uses is protected, it is above all because it benefits society. Like Auguste Comte, Courcelle-Seneuil speaks of the social function of the merchant, the owner, and the capitalist.² Law no longer protects the so-called subjective right of the owner. It guarantees to the possessor of wealth the liberty to fulfil the social task incumbent upon him by reason of his wealth. Property especially, then, is being socialized.

I am anxious to avoid being misunderstood in this matter. I do not say, and I have never said or written, that private ownership as an economic institution is disappearing or should *disappear*. I maintain merely that the *legal notion* upon which protection of property is founded is *being modified*. Individual ownership, nevertheless, continues to be protected against all attacks, even those of the State. I will go even further and say that it is more strongly protected under the new than under the old conception.

I accept also as a fact the possession of capitalistic wealth by a limited number of individuals. There is no need to criticize or justify the fact; it would, indeed, be labor lost, for the reason

¹ *Auguste Comte*, "Système de politique positive" (ed. 1892), Vol. I, p. 156. Cf. also on the question of the social use of property: *Landry*, "De l'utilité sociale de la propriété individuelle" (1901); *Haurion*, "Principes de droit public" (1910), p. 39.

² *Léon Say*, "Dictionnaire d'économie politique" under the heading "Propriété."

that it is a fact. Nor shall I inquire whether (as certain schools of thought assert) there is an irreconcilable conflict between those who possess wealth and those who do not, between capital and labor, and whether in this conflict capital is to be despoiled and annihilated. I can not refrain, however, from voicing the opinion that these schools take an altogether erroneous view. The structure of modern society is not so simple. In France in particular, many persons are both capitalists and laborers. It is a crime to preach the struggle of classes; I believe that we are moving, not toward the destruction of one class by another, but towards a society where there will be a coördination and a hierarchy of classes.

§ 49. **The Obligation to Cultivate Land.** — The conception of property as a function, and the idea of society extending its protection to the application of wealth to certain uses, provide a very simple and clear explanation of the laws and decisions which are repugnant to the conception of property as a right.

An objection has been repeatedly raised to this explanation. Opponents have argued: "We understand your view; we even admit that society is moving toward a system of law in which the right of property will rest upon the duty of the owner to fulfil a certain function. But we have not yet reached that state; and the proof is that no statute yet imposes upon an owner the obligation to cultivate his field, repair his house, or utilize his capital. And yet that is the necessary and logical consequence of the conception of property as a function."¹

The objection does not embarrass me. From the fact that the law does not yet directly force the owner to cultivate his land or repair his houses or utilize his capital, it cannot be concluded that the idea of social function has not yet supplanted the idea of a subjective right of property. Such a law has indeed not made its appearance, because the need for it has not yet been felt. In France, for example, the amount of land left uncultivated by the owner or the number of houses which are unproductive is insignificant in comparison to the total capital in real estate which is being worked. But the fact that the question of such a law has been raised is itself evidence of the transformation that has taken place. Fifty years ago such a question was in no man's mind; to-day it is everywhere agitated. And if, in a country like France, the time should come when the non-cultivation of the land became a serious problem, no one would then deny, certainly, the justification of intervention by legislation. As to the non-employment or hoard-

¹ Cf. notably Jèze, "Revue du droit public" (1909), p. 193.

ing of capital consisting of personalty, the legislator will have difficulty in his attack. However, it cannot be doubted but that, were he able to discover the unproductive accumulation, he should prohibit and prevent it.¹

In those countries which are still (as I expressed it a while ago) in the stage of ownership-as-a-speculation, the problem of the non-cultivation of the land is arising. And that proves that even in these countries the conception of property as a right tends to disappear. Are those who buy vast tracts of land at a relatively low price and allow them to lie idle for years while the natural increment of value in the land returns them an enormous profit, — are they not guilty of conduct which should be prohibited? If the law intervened to prohibit this, its policy could hardly be questioned. But such a policy is very far distant from the conception of an inviolable right of property, implying in the owner the right to act or to remain passive at pleasure.

§ 50. **The Tax upon Unearned Increment, in England and Germany.** — Though less rapid than in the countries of South America and especially the Argentine Republic, the automatic rise in land values in rural and urban districts, independent of any labor spent upon them, is taking place all over Europe. So long as the conception of property as a right held sole dominion, excluding all other conceptions, the question of touching directly or indirectly this increment, which is due to no act of the owner but in spite of his inactivity, did not arise. To-day, however, this question is raising its head everywhere, and in two countries (certainly of no little importance), England and Germany, a duty has just been laid upon the unearned increment of land.

¹ In his "Principes de droit public" (1910), p. 38, *Hauriou* says very justly: "And finally we reach the most individualistic of individual rights, the right of private property. The element of function is hidden within it. . . . Certainly the owner is not now bound to cultivate his land; but we count upon frequent transfers of ownership. . . . We know that if one owner does not cultivate his land the next owner will, and that it will be in the interest of a very great majority to cultivate. . . . Everything has been skilfully calculated that the economic function of ownership might be assured by the simple play of liberty. But, if some day it becomes clear that the cultivation is not thereby secured in sufficient proportion, there is no doubt that a legal obligation to perform that function under penalty of expropriation would be forthcoming." *Hauriou* correctly instances how such an obligation exists in colonial grants of land, and also in mining concessions which endure only during the period of actual working. This is in fact illustrated by Article 49 of the Act of April 21, 1810, and Article 10 of the Act of April 27, 1837. The scope of these provisions has indeed been questioned; but the obligation to exercise the grant is certainly formally recognized and strongly sanctioned by the bill which has now been before the Chamber of Deputies for several years.

In England, the Finance Act of 1910 provides by Article 1 for the establishment of a tax called an "increment value duty": "Subject to the provisions of this Part of this Act, there shall be charged, levied and paid on the increment value of any land a duty, called increment value duty, at the rate of one pound for every complete five pounds of that value accruing after the thirtieth day of April, 1909. . . ." ¹ By Article 13, upon the expiration of every lease, a duty is charged upon the value of the benefit accruing to the lessor. It is called "reversion duty", and amounts to one pound for every complete ten pounds of that value. But that is not all. The same English Act attacks the inactive land owner and levies a special duty upon the site value of undeveloped lands. It provides (Article 16): "Subject to the provisions of this Part of this Act, there shall be charged, levied and paid for the financial year ending the thirty-first day of March, 1910, and every subsequent financial year in respect of the site value of undeveloped land, a duty, called undeveloped land duty, at the rate of one halfpenny for every twenty shillings of that site value." ²

In Germany, the duty upon unearned increment, created by Paragraph 90 of the Act of July 15, 1909 (Imperial Revenue Law),³ was regulated by the Act of February 14, 1911.⁴ According to this Act, an appraisal of the increment of the land value is made and a proportion of the increment is taken as a tax at the moment of every transfer for a consideration of real estate "inter vivos" with the exception of certain privileged grants. Only the unearned

¹ 10 Edw. VII, Chap. 8, Art. I; "Law Reports, Statutes", Vol. 48 (1910), p. 10.

² *Ibid.*, p. 20. Cf. the interesting article by W. Oualid: "L'imposition des plus-values foncières en Angleterre", in "Revue de science et de législation financière" (1910), pp. 389 *et seq.*; cf. also the speech by Mr. Lloyd-George, Chancellor of the Exchequer, April 29, 1909, in the House of Commons, analyzed in detail in the "Bulletin de statistiques et de législation comparée" (1909), Vol. II, pp. 593, 595. He said: "The owner of valuable land which is required or likely in the near future to be required for building purposes, who contents himself with an income therefrom wholly incommensurate with the capital value of the land in the hope of recouping himself ultimately in the shape of an increased price, is in a similar position to the investor in securities who re-invests the greater part of his dividends. But while the latter is required to pay income tax both upon the portion of the dividends employed and also upon the portion re-invested, the former escapes taxation upon his accumulating capital altogether, and this, although the latter by his self-denial is increasing the wealth of the community, while the former, by withholding from the market land which is required for housing or industry, is creating a speculative inflation of values which is socially mischievous." Cf. "Official Report," Parliamentary Debates, Commons (1909), Vol. IV, p. 539.

³ Reichsstempelgesetz.

⁴ For a French translation of the text of this law, see "Bulletin de statistique et de législation comparée" (1911), I, pp. 339 and 442.

increment, or that arising out of no act of the owner, is touched. Interesting details concerning this duty will be found in the articles of W. Oualid.¹ He very justly distinguishes the reasons leading to the English law and the German law. In England the duty upon the increment of land values has been regarded chiefly as a means of economic and social reform; in Germany the theoretical principle has been invoked in its support, but the real cause of the Act was to staunch the deficit in the Imperial budget.

It will not be unprofitable to compare these laws with a French Act, little known and rarely if ever applied. The Act of September 16, 1807, Article 30, permits, where land benefits by a public undertaking, of the recovery from the owner thereof of a part of the increment due to the undertaking. It says: "When as a result of the undertaking already mentioned, when by the opening of new streets . . . or by any other public work of a general nature, or of the Department or Municipality, ordered or approved by the Government, private owners shall have benefited by a marked increase in the value of their lands, such lands may be charged with the payment of an indemnity as high as one half the benefit accruing to them."²

§ 51. **Modern Doctrine as to Use of Property.** — This objection answered, it is an easy task to define what I shall call the scope of the conception of property as a function, and to show that the propositions in which it may be formulated fit perfectly with the late cases and laws. By reference to what has been said regarding the fact of social interdependence and the division of labor, I come naturally to the two following conclusions:

1. The owner has the duty and, therefore, the power to employ his wealth to satisfy individual needs and especially *his own needs*, and to employ his wealth for the development of his physical, intellectual, and moral forces. It should not be forgotten that the development of the division of labor in society is in direct proportion to the development of the forces of the individual.

2. The owner has the duty and, therefore, the power to employ

¹ "Revue de science et de législation financière" (1910), pp. 173 *et seq.*, and (1911), pp. 325 *et seq.*

² Cf. the report of *Bonnevay* made to the Chamber of Deputies, advising the rejection of the Act, proposed by Carnaud and several other members (July 11, 1907), to assure to Municipalities participation in the increment of land values resulting from public improvements. Bonnevay declared, speaking for the Committee, that the terms of the Act of September 16, 1807, Art. 30, and of the Act of May 3, 1841, Art. 51, were amply sufficient. See "Journal Officiel, documents parlementaires", Chamber of Deputies, extraordinary session, 1909, No. 2, 813, p. 60.

his property to the satisfaction of the *needs of the community*, the nation, or some part of the nation.

Now, my first proposition is that the owner has the duty and, therefore, the power to employ his wealth to satisfy his individual needs. But it goes without saying that this power embraces only those acts compatible with the exercise of individual liberty such as I have already defined it, that is to say, with the free development of one's individual forces. Acts done with another purpose than that of public usefulness will be held contrary to the law of property and give reason for repression or indemnity.

This explains very simply and logically those rules of law which recognize and sanction the prohibition against an owner's doing with his wealth some act lacking utility. Modern law is explainable on these grounds, without resort to contradictory and irrelevant doctrines of the "abuse of power" (discussed later) and of the limitation of the right of property, founded upon the impossible distinction between a normal and abnormal use of that right. If, in spite of the serious damage it causes my neighbor, I may lawfully construct upon my land a house which returns me a revenue, it is because I employ my wealth in my own interest, true; but also for a purpose beneficial to social interdependence. I fulfil the social task which my possession of that land enables me to fulfil. I secure the satisfaction of social needs. On the other hand, the Courts have very correctly held that I may not be allowed to construct a screen-fence on my land, or a false chimney on the roof of my house, or to excavate without purpose in my garden, because, in doing so, I perform acts without utility to myself or benefit to society.

But, it will be objected, it is not the useless acts that are in reality prohibited; what is prohibited is the injury which they cause to another. Not at all; just the contrary. If the damage caused to another entails reparation, it is because the acts are prohibited. We have seen, that between individuals damage does not entail reparation unless the damage is imputable to a wrongful act, and a wrongful act is nothing else than a violation of law. The truth is that when the acts of an owner are without usefulness to himself and cause injury to another, the law prohibiting those acts is enforced by reparation. But the prohibition exists independently; for without it the action would not exist. If the act were not prohibited, it would not be unlawful; the party who suffered the injury could not recover damages.

It would be easy, too, to show that the general idea on which the

new legal doctrine of property is based tallies with the principles laid down by statutes and Courts, principles which are, furthermore, in open contradiction with the traditional conception of property.

If property is an exclusive right over a thing, the owner has the right to prevent a third party from performing any act with respect to the thing, which is the object of his right, even though it be an act occasioning him no damage or in any way diminishing his enjoyment of it. Now, in several countries, notably France, recent laws permit, even for private purpose, and without its constituting in any way a disseisin or expropriation, and, therefore, without any indemnity being due, the construction of telegraph and telephone lines and of conductors of electrical energy over private property. No damages are due in such cases unless physical injury results. It is important to note that this is true even of private lines for telegraph or telephone or for conducting electrical energy to private factories. The Act of July 28, 1885, relating to the construction and maintenance of telegraph and telephone lines, and the Act of June 15, 1906, concerning the distribution of electrical energy, are very typical of the new development, and illustrate excellently how the progress of science is every day rendering the bonds of social solidarity stronger and giving rise to new conceptions in law.

I should add that the question has been raised in the Courts whether an individual can, without the help of the government, force an owner to permit wires conducting energy or current for electric light to pass over his house or land. The Courts have not yet dared to go that far.¹ But the simple fact that the question has been seriously raised shows to what a distance we have departed from the old conception of ownership as an absolute and exclusive right, and from its application as seen in Section 1 of Article 552 of the Napoleonic Code, which declares that: "The ownership of the soil includes the ownership of what is above and below."

§ 52. **The Doctrine as to Misuse of Property.** — Let us now return for a moment to consider the modern development of the principle of "misuse of right."²

As early as 1855, it was decided that "if in principle the right of property is a right in a sense absolute, authorizing the owner to use and abuse the object of his ownership, nevertheless the exercise

¹ Cf. Tribunal of Bordeaux, November 27, 1908, reported in *Sirey*, 1910, Part II, p. 230.

² "Abus de droit."

of that right, like any other, must be limited to the satisfaction of a serious and lawful interest.”¹ So an owner was ordered to take down a blind wall which he had erected on his land, the Court saying: “. . . X can not without ‘abusing his right’ maintain a blind wall presenting no utility to himself and serving only to injure his neighbors.”² The Court of Cassation also decided that an owner may not make excavations on his land when they are without purpose and result in injury to his neighbor. It said “. . . Art. 544 gives to each one the right of enjoying and disposing of his property in the most absolute manner possible; this right is tempered by the natural and legal obligation not to cause any damage to another’s property; . . . it has been proved that the work of drilling carried on by X on his own property was most injurious to the springs on his neighbor’s property and that the drilling could not benefit his own spring. . . .”³

The classic individualists have vigorously maintained the principle of property as an absolute right, and have criticized these decisions of the Courts. Baudry-Lacantinerie,⁴ especially, says: “By constructing a wall on my land, which is free from any servitude, I close the view which the house of my neighbor enjoyed over the country; I owe no indemnity because I only make use of my right: ‘Neminem laedit qui suo jure utitur.’” Others, though hesitatingly, have accepted the idea of a limitation to the right of property. But to limit the right of property save in the case of easements in benefit of the public is a grave matter. Is it not destroying the right itself? Then, too, upon what is this limitation to be based, how is it to be measured?

These difficulties have raised discussions and academic distinctions which have resulted in nothing. This was inevitable. On the one hand, property was defined as the right of enjoying and disposing of a thing at pleasure and on the other hand it was declared that this pleasure was limited. Furthermore, to explain the cases (which are the sure expression of the present state of the law), it is not enough to say that the right of property is limited. If, indeed, the right of property merely received limitations, the resulting obligation on the part of the owner would be to abstain from certain acts in relation to the thing. Now, it is not merely an obligation to abstain which is imposed upon him; there are also

¹ Court of Colmar, May 2, 1855, *Dalloz*, 1856, II, p. 9.

² Court of Gex, July 27, 1900, *Sirey*, 1901, II, p. 147.

³ June 10, 1902, *Sirey*, 1903, I, p. 12.

⁴ “*Droit civil*” (9th ed.), II, p. 424.

affirmative obligations. He must, for example, take certain precautions, and if he does not, he is liable. A decision of the Court of Cassation is particularly striking in this respect. It says: ". . . a manufacturer who, by the running of a factory, causes an injury to his neighbors exceeding that which is measured by the ordinary obligations of adjoining owners, is at fault if he neglects to take those precautions necessary to prevent those injuries; . . . it follows that, in holding the contrary, the judgment from which the appeal has been taken violated Art. 1382 of the Civil Code."¹ I do not say that this decision of the Court of Cassation is beyond criticism. But I support it because it shows that the Courts do not hesitate to admit the existence of affirmative obligations resting upon the owner.

It has been thought that these contradictions and difficulties are avoided by a theory, seductive, certainly, at first sight, which still enjoys a larger credit. It has been adopted by the civil codes of Germany and Switzerland; in France it has been the object of very scientific study, notably by Saleilles, Josserand, Ferron, and Ripert. The German Civil Code in Article 226, says: "The exercise of a right which can only have the purpose of causing injury to another is unlawful;" and Art. 3, Sect. 2 of the Swiss Civil Code declares that: "The law does not protect one who clearly misuses his right."

I admire their effort to construct this theory of the "misuse of right." But it can not succeed, because the theory contradicts itself at the very outset. To say that the abusive exercise of a right is not permitted, or further, that the law does not protect one who clearly misuses his right, is simply saying that one may not do something that one has not the right to do, or that the prerogatives belonging to a given right are being exceeded. There is nothing novel in that. The theory of the "misuse of right" contains nothing specific in itself. I do not agree with Planiol² that the phrase "'abusive exercise of rights' is a war of words." But, like him, I believe that, if there is a right, it ceases where the misuse commences.

The truth is that this theory or at least this phrase, *misuse of right*, is explained by its history. It was a means originated by lawyers to avoid the consequences which logically flowed from the absolute character of the right of property, and yet to maintain this characteristic. For that reason the theory of the "misuse of

¹ February 18, 1907, *Dalloz*, 1907, I, p. 385.

² "Droit civil", II, 871.

right " has been applied only to the right of property. A similar means was successfully employed, it is true, to subject to judicial control the so-called "discretionary acts" of government administrative officers. The "imperium" of the government, when regarded as absolute, justified every administrative act if it was done in proper form and in regular course by the officer having authority to do it, regardless of the purpose back of the act. The Council of State skilfully introduced the theory of the "misuse of power."¹ Little by little "misuse of power" has been confused with "exceeding one's authority", which is, indeed, identical. An administrative officer exceeds his powers in both cases, whether he performs an act without authority, or whether he performs an act outwardly within his jurisdiction but with another purpose than that intended when the authority was given him. The "misuse of power" and the "misuse of right" were means invented to counteract the consequences of the absolute character attributed to "imperium" and "dominium." We have come to recognize that misusing one's power is identical with exceeding one's power; we should now recognize that misusing one's right of property and exceeding the limitations placed upon one's right of property are identical. That is why the theory of the "misuse of right" does not explain the ground of the liability of the owner, or why the advocates of this theory are as embarrassed as those who simply declare that the right of property itself is limited.

The "misuse of right" is best represented by the equation formulated by Ripert² and also by Ferron.³ According to these authors the misuse commences when an individual by an excessive or *abnormal* development of his activity, or liberty, or right of property obstructs the *normal* development of the liberty, or right of property of another. In the end, then, the "misuse" of a right would be the abnormal exercise of that right. It remains to be determined what the normal and what the abnormal exercise of a right is in general, and in particular of the right of property. Evidently this is not easy; I would say, rather, that it is impossible. The conception of the normal and abnormal in sociology, in spite of the authority of Durkheim, its great advocate, can lead to nothing.⁴ According to this eminent sociologist, the normal is any act falling

¹ ["Détournement de pouvoir"; something like our "ultra vires." —Ed.]

² Court of Cassation, February 18, 1907, *Dalloz*, 1907, I, p. 385, notes 1, 2, 3.

³ Court of Bordeaux, December 14, 1903, *Sirey*, 1905, II, p. 17, note.

⁴ "Les règles de la méthode sociologique" (F. Alcan), pp. 59 *et seq.*

within the mean of all social acts.¹ But then, we have to determine the basis for establishing this mean, and that is certainly impossible. In particular, the normal manner of enjoying wealth would be impossible of determination.

§ 53. **French Act of 1907 relating to Churches.** — My second proposition was that the possessor of wealth has the duty and, therefore, the power to employ it for the satisfaction of needs common to a *whole community*, large or small, as the case may be, or in pursuit of a purpose interesting a group, upon the condition, of course, that the purpose is lawful. This proposition leads to the recognition of the distinct existence of the fund contributed in common by an organized group of persons. In other words, the recognition of the liberty to associate and to establish funds for certain uses. This does away with all the subtle and useless controversies over collective personality.²

I would point out one application of the rule, deserving of attention, because it illustrates at close range how the new conception of property, what I call property as applied to certain uses, or ownership without an owner, is supplanting the old conception of property as a right. The change is seen in the legal consequence of the separation of the Church and State in France, a consequence deserving, indeed, a careful study. The Law of Separation of December 9, 1905, recognized that the property of the Church belonged to the State, or to the departments, or in the majority of cases to the municipalities, but that its use should be left for purposes of worship to those religious associations which were organized for such purpose. By the Papal Encyclical "*Vehementer nos*" of February 11, 1908, and by the Encyclical "*Gravissimo officii munere*" of August 10, 1906, Pope Pius X (for reasons which I need not consider here), formally forbade the Catholic clergy and

¹ Upon the "misuse of right", besides the notes of *Ripert* and *Ferron* (*supra*, p. 110, notes 2 and 3,) cf. especially: *Teisseire*, "Essai d'une théorie générale sur le fondement de la responsabilité" (thesis, University of Aix, 1901); *Ripert*, "De l'exercice du droit de propriété dans ses rapports avec les propriétés voisines", (1902); *Charmont*, "L'abus du droit", in "Revue trimestrielle de droit civil" (1902), pp. 113 *et seq.*; *Josserand*, "De l'abus des droits" (1905); *Salanson*, "De l'abus du droit" (thesis, University of Paris, 1903); *Marc Desserteaux*, "Abus de droit ou conflit de droits" in "Revue trimestrielle de droit civil" (1906), pp. 119 *et seq.*; and especially *Saules*, "Rapport" made to the first sub-commission upon the revision of the Civil Code, in "Bulletin de la société d'études législatives" (1905), pp. 329 *et seq.* A decision of the Civil Court of Toulouse of April 13, 1905, declared the "misuse of right" similar to the "excess of authority"; *Dalloz*, 1906, II, p. 105 and a note by *Josserand*. Cf. *Hayem*, "Essai sur le droit de propriété et ses limites" (1910), especially pp. 391 *et seq.*, and pp. 423 *et seq.*

² Cf. Topic III.

laymen of France to form associations for purposes of worship. As a result it seemed as though the State and municipalities would acquire the use of the churches, that is to say the free exercise of their right of ownership. But the Briand Law ¹ was passed, declaring that: "In the absence of associations for worship, edifices dedicated to worship, as likewise the furniture found therein, shall remain for the use of the worshippers and priests of the Catholic religion for the practice of their faith."

The law said nothing more, and those who drafted it certainly had not foreseen the consequences which were to result when the question of its enforcement was raised. Conflicts did arise, in fact, pretty frequently between the mayors and the curates. The latter were regularly named by the bishop, while the mayors, acting in the name of the municipality as owner, sometimes installed a schismatic priest, who introduced into the municipality a form of worship that was equally schismatic. Orthodox Catholics and the priests regularly appointed by the bishop claimed the use of the church for Catholic worship. Had they any legal means of effecting their purpose? They were not owners, for the municipality was the owner; they could not hold title as beneficial users of the property, since they were not a person, a subject of right; in other words the worshippers as a group certainly did not possess legal personality, and the priest, as such, had no legal personality distinct from that which he enjoyed as a private individual. The congregation, therefore, had no right of action; in the individualistic or subjective system they could not have. However, the Council of State and the civil Courts have handed down a very important line of decisions, recognizing in the orthodox priest and in any orthodox worshipper in a municipality the power to act in order to procure protection for the use of the church for Catholic worship, even against the municipality itself as owner.² Here we discover

¹ January 2, 1907, Art. 5, Sec. 1.

² The most important decision of the Council of State is without any doubt that of the case of *Deliard*, February 8, 1908, based upon the report of *Chardenet*, the State's attorney. In this case, the mayor of a certain municipality, having issued an order forbidding both the priest regularly installed by the bishop, and also the priest of a dissenting body to carry on the orthodox service in the church, the Council of State recognized in *Deliard*, who had been appointed by the bishop, a right to demand the revocation of the mayor's decree. The Court said: "... *Deliard*, a Catholic priest, exercising his post in the municipality of . . . possesses an interest, as indeed does every Catholic of that municipality, to procure the revocation of a decree effecting the closing of the church . . .; the mayor, by his decree, has trespassed upon the free exercise of worship guaranteed by Article 1 of the Law of December 9, 1905 and Article 5 of the Law of January 2, 1907. . . ." ("Recueil", 1908, p. 127.) Similar

a right of property, of itself negligible, and a dedication to a use, which is the whole thing; which is even protected against the right of property itself. Here the application of property to a use is effectively protected as such, and neither a subject of right nor a subjective right is revealed. No more striking example could be found of the evolution of juridical conceptions already sketched.

decisions by the civil Courts are very numerous. I will only mention three of the most recent.

The Court of Cassation in two decisions, Feb. 5, and 6, 1912, *Baudouin*, First President, presiding, held that where there was a conflict between two priests, of whom one represented a form of service not recognized by the Church, or had been dismissed by the bishop, and the other had been regularly named by the bishop, the latter alone had the right to appeal to the civil jurisdiction for power to carry out his vocation by an award, for example, of the keys of the Church.

The second case was that of the Priest Journiac, of the Municipality of Apehon, affirming the Court of Riom, March 1, 1909, reported in *Sirey*, 1909, II, p. 28, where we read: ". . . under the terms of Article 5, sec. 1 of the Law of January 2, 1907, in the absence of associations organized for worship, edifices given over to religious worship, as also the furniture found therein shall continue in the use of Catholics and ministers of that religion for the practice of their faith; except where such use ceases, as provided for by the Law of December 9, 1905; . . . this law expressly continues under the new régime of separation the use of religious edifices for the service which had previously been celebrated there under the Concordat; . . . in applying this principle, if a conflict arise between two priests for the occupation of the same Catholic church, its use is to be exclusively reserved to the priest who recognizes the authority of the general organisation of the faith according to which he proposes to worship, especially the authority of the ecclesiastical hierarchy, and who remains in communion with his bishop; . . . an appeal is without grounds which merely claims that the lower Court refused to inquire whether the dismissal of the priest Esdolue by the bishop of Saint-Flour was regular according to canon law, or whether it was not in fact null and void under the canon law, as the plaintiff expressly alleged; . . . the Court of Appeal expressed its reasons for refusing to go into these claims, rightly declaring that it had no jurisdiction to inquire whether the measures taken by the Church officers over the curates Esdolue and Journiac were in agreement with the rules of the canon law, or to inquire into the propriety of those measures." Reported in "Gazette du palais", February 21, 1912.

The Court of Appeal of Paris, February 9, 1912, recognized a suit for a preliminary judgment brought by the priest of the cathedral of Rheims and by a certain number of his parishioners, demanding the reestablishment in their original conditions of certain dependencies of the cathedral, which had been modified by orders of the prefect of the Department. Cf. "Le Temps", February 11, 1912; cf. *Duguît*, "Traité de droit constitutionnel" (1911), Vol. II, pp. 128 *et seq.* and the bibliography and list of cases there cited; *Bach*, "L'affectation des églises" (1911).

CHAPTER IV

CHANGES OF PRINCIPLE IN THE FIELD OF FAMILY,
INHERITANCE, AND PERSONSBY JOSEPH CHARMONT¹

Introduction.

I. THE FAMILY OF YESTERDAY AND OF TO-DAY

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| § 1. Influence of Social Environment. | § 3. Changes in the Concentration of Family Ties. |
| § 2. The Family of the Old Régime. | |

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| § 4. Enforced Partition. | (1) Enlargement of Disposable Portion. |
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III. THE CORPORATION AND THE FAMILY

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(1) Regulation of Child Labor.
(2) Exceptions. | § 14. Industrial Employment of Women in the Home. |

¹ [This Chapter represents pp. 1-164 of the author's "Les transformations du droit civil" (Paris, 1912, Librairie Armand Colin, Leclerc & Bourelle).]

JOSEPH CHARMONT is Professor of Civil Law at the University of Montpellier. Among his other works are: "Le droit et l'esprit démocratique" (1908); "La renaissance du droit civil" (1910). Part of the latter work has been translated into English in Vol. VII of the Modern Legal Philosophy Series (1916), "Modern French Legal Philosophy."

In the Editorial Preface to the last-named volume will be found a fuller account of the author's place and work in French legal thinking. — ED.]

V. FORMALITIES OF MARRIAGE

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| § 15. Exaggerated Formalism of the Code. | § 17. Criticism of Reforms. |
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VI. SOCIAL VALUE OF MARRIAGE

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| § 22. History of the Limitations Imposed. | § 26. Her Nationality. |
| § 23. Early and Revolutionary Law. | § 27. Her Name. |
| § 24. Napoleon's Hostility. | § 28. Her Loss of Liberty. |
| | § 29. Inequality of Parental Authority; German and Swiss Legislation. |

VIII. MARRIED WOMEN'S PROPERTY

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IX. STATUS OF MINORS: (1) ABANDONED CHILDREN

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XI. STATUS OF MINORS: (3) VICIOUS AND DELINQUENT CHILDREN

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| § 49. Increase of Juvenile Crime. | § 51. Minors under Criminal Law. |
| § 50. Parental Correction; Estimate of Laws; Results. | § 52. Correctional Institutions. |
| | § 53. Preventive Measures. |

Introduction. — In this study we have tried to show the principal changes that have taken place in the private law of France since the adoption of the Civil Code. We have, therefore, as a rule taken the work of the authors of the Code as our point of departure, and have sought to show how, during this period of more than a century, their work has been developed, completed, and corrected.

There were times when the reforms were contained in germ within the Code itself; the principle alone had been established. Thus, in the organization of the family, parental authority has ceased to be a right established for the benefit, and in the interest of the person exercising it. As early as 1804 it had become a simple power of protection, a means for the father to fulfill his duties toward his child. But the idea had merely been formulated; its consequences had not yet been worked out. Little by little they became apparent and were gradually accepted. In this case, we shall inquire how the influence of this conception operated upon subsequent laws and customs, upon legislator and judge. In other cases there has been a reaction against the Code. A new current has set in; the law's regulation has been inspired by a new spirit; there has been a consciousness of the hardship and injustice of certain provisions, and these have been repealed or reformed. It will suffice to cite the measures affecting the condition of the illegitimate child, the married woman, and the relations of employer and employee.

The important point seems to us to be not that our investigation shall be complete, that we forget nothing, and enumerate every change and every reform. We shall only inquire into certain fields of private law, those relating to the family, to property rights, and to liability for injurious acts.

To view as a whole the changes that have taken place in the organization of the family, we have endeavored to sketch the traits that differentiate the family of yesterday from that of to-day.

Under the Old Régime the family was more stable, more solidly constituted. Rural land holdings were in a sense its main brace. The aristocracy was an aristocracy of land. Custom even more than the law tended to assure the preservation and the undivided transmission of the land, which continued a permanent source of protection for all the members of the family.

To-day the family is more mobile, less stable, and less rigidly constituted. It has seemed to us important to characterize the economic influences to which it has been subjected, and in the first

place that of enforced partition. With each generation the land is divided. Will not this process of parcelling lead to the destruction of the family and of small ownership? The era of the corporation has replaced the landed aristocracy by a financial oligarchy. The families possessing capital divide into two classes: a small minority reserve the management of great undertakings and the greater share of the profits; the mass is composed of passive husbanders of earnings who cannot do without the law's protection. What the law has accomplished for the protection of the modest saver is almost nothing in comparison to what remains to be done. Lastly, the family has been disorganized by industrial labor which has called in turn to the factory the father, the mother, and the child. Here again, to remedy the abuses, the intervention of the law has been necessary. It is from the point of view, then, of family interests that we have studied the question of regulating industrial labor. . . .

Strictly speaking, we offer no conclusions. Our one purpose has been to portray the evolution of the law during a period of time. Just as life may not be anticipated, so its deepest meaning, its ultimate character, escapes us. The exposure of facts holds a more important place in this book than the discussion of ideas. The questions discussed are not generally susceptible of solution by preferences. Without our leave, the facts answer for us. Whether we would or no, and whatever may be our opinion, democracy, equality before the law, universal suffrage, in our day and in a country like ours, are facts which must be reckoned with. The protection of the married woman and of the child, the regulation of labor, the increasingly numerous restrictions placed upon private property in the interests of society, are also facts of the same order.

With us, however, the action of democracy upon law is not merely accepted as a necessity; we welcome it as progress. In spite of the causes for concern and regret that the accomplished task may leave, it seems to us, as a whole, beneficial. It tends, by assuring to each his share of right, to diminish the sum of unjust suffering in the world.

I. THE FAMILY OF YESTERDAY AND OF TO-DAY

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| § 1. Influence of Social Environment. | § 2. Distinguishing Features.
§ 3. Concentration of Family Ties. |
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§ 1. **Influence of Social Environment.** — What changes have been taking place in the last hundred years in the constitution of

the family? Has it been weakening? Has it tended toward disorganization? Is it not breaking those bounds within which the Civil Code aimed to enclose it?

The Code looked upon marriage as the legal basis of the family: out of it arose relationship, parental authority, and successorial rights. The entire French system of domestic relationship rests upon marriage. Marriage establishes the bond between the child and the families of its father and mother; the illegitimate child, born out of wedlock, belongs to neither of the families of its parents. Nevertheless it has become necessary to take into account the increasing number of irregular unions and to give heed to the causes of this increase. The amelioration in the condition of the illegitimate child has already become a necessity: is it not likely that the legislator will have to give heed to these irregular unions, to regard them as a second basis of family relationship, recognizing them under certain conditions and attributing certain consequences to them?

What has been the extent of the influence of social environment upon the family? Taine entitled the problem thus: "Church, school, family, modern environment, facilities and difficulties which a society, constituted as ours, finds in living in its own environment."¹ He left the problem unsolved. It would seem too complex to be viewed as a whole and to receive but one solution. It would first require numerous exhaustive studies of families, enabling us to follow their history in point of time and space through several generations; to know and understand their origin and their progress, how their influence has grown and been maintained, and the causes and nature of their decadence. Sociologists have scarcely touched this material; it has been attempted only by the novelists. Balzac and Zola have each portrayed a certain period, with its passions, trials, and sufferings, the vices and miseries of each social class, the injustices of the economic system. Unfortunately it is not possible in such works to separate imagination from observation, fiction from truth.

When facing a problem that is too general, we are forced to divide it, observing it from various aspects, and studying independently each of the causes that may have determined an effect. Thus, we may investigate the influence upon the family of certain institutions, or of certain economic facts such as the enforced partition of lands, the rise of movable wealth, or the system of industrial labor.

¹ "Les origines de la France contemporaine", Vol. II, "Le régime moderne", pref., p. 1.

We may also by a comparison separate out the principal features that distinguish the family of yesterday from the family of to-day.

§ 2. **The Family of the Old Régime.** — It seems paradoxical to say that we know the families of the past better than those of the period in which we are living. But nothing is more difficult than to observe and know one's own time. To detach ourselves from our own ideas, said Taine,¹ "to force our minds to withdraw the necessary distance, to stand aloof and adopt the critic's viewpoint, to observe successfully ourselves, our notions and our institutions as objects of science, requires a great effort, many precautions, and long reflection." We know little of our own family. Has it always belonged to the same social economic class? If not, how did the change take place? If there has been decadence or impoverishment, in what measure are we or our ancestors responsible? We scarcely know more than the external history of each family, its apparent fortune, its profession, worldly relations, the esteem in which it is held; while much of its suffering, its inward misery, its acts of doubtful honesty remain hidden. Each group seeks to hide or to bury in forgetfulness the faults and weaknesses of its members.

On the other hand, archives, memoirs, and journals often instruct us far better in the history of the families of former periods. There have been published many of these old family journals which it was customary to keep, and wherein were entered all events of importance, genealogy, marriages, the births and deaths of relatives, fortune, inventories and titles to property.

On weighing these critical data, two fundamental differences become apparent. The family of former times was larger and stabler than the present family; parental authority was stronger and more respected. In the middle and rural classes under the Old Régime, the family was stable, faithful to its traditions, and attached to one profession and locality. As families were large, some of the children frequently left and established themselves elsewhere. But the family nucleus perpetuated itself, preserved its home, and in each generation counted a representative in its chosen profession, — lawyer, solicitor, merchant, or husbandman. When we consult the archives of the small municipalities, we find the same family on the same land throughout centuries. Its tendency was to rise gradually; each generation passed to a new level. Paul Bourget called this progress the "mile-stones" ("l'étape").

¹ "Les origines de la France contemporaine", Vol. II, "Le régime moderne", pref., p. 2.

To-day the conditions are far more unstable. Parents provide, with great sacrifice, for the future establishment of their few children, and concentrate their affection upon them. Rivalry has grown much more acute, and the sense of solidarity among relatives has weakened. We may be excused from concern for others, and we can rely upon scarcely any but ourselves. And so some go far, rise high; but those who fall are abandoned to themselves and reach the depths of misery. Another phenomenon that is characteristic has taken place: urban immigration. The cities have exercised a sort of attraction. In 1846 urban population represented scarcely a fourth of the total of France; in 1896 it was already more than a third; it will soon be a half. This displacement or dispersion breaks or loosens the family ties; relatives no longer know each other, and are even lost to sight.

The families of earlier periods were not alone more unified and sedentary; they were also more subject to discipline. Parental authority was very inflexible — especially in the southern provinces, known as those of the written law, where Roman influence had been preserved. The powers of the father were lifelong. Their consequences continued without regard to the child's age, unless the father himself by a formal voluntary act of emancipation renounced his rights. In some provinces of the written law, it is true, marriage emancipated. But emancipation of this sort appears to have been exceptional; and in the jurisdiction of those Parlements that rejected it, the children of a son who was married but not emancipated, did not come under their father's power, but (as at Rome) under that of their paternal grandfather. In a monograph upon a family of Limousin, by Guibert, we may read the account of one of these tardy emancipations, performed some weeks before the date of the Revolutionary enactment that suppressed the permanent character of parental authority. The account shows the father so aged and infirm that the judge has to come to the house. The son of forty-seven years, a priest of Bazoches-en-Gâtinais, "falls upon his knees, and, clasping his hands, prays his father to emancipate him, that he may conduct his affairs as a free and independent man. The aged father declares his consent that his son be henceforth enfranchised from his authority; and in sign of emancipation, the father raises the son and unclasps his hands."¹

Apart from certain exceptional classes of property (the "*peculæ*"), all the child's earnings belonged to the father, absolutely,

¹ *Guibert*, "*La famille limousine d'autrefois*", p. 24.

or at least beneficially.¹ Even with his father's consent the child could not make a will. The rule of the "Senatusconsultum Macedonianum" remained in force, according to which the son, even when of age, could not bind himself for a loan.

The father possessed a right of correction and absolute direction over his child's person, — a right which survived from the Roman law. All decisions affecting the future, such as marriage or the choice of a career, were made by the father, or at least at his suggestion; and his authority was respected to such a point that we cannot say whether it was based upon custom or upon law. The father might himself punish his son, on condition that he did not exceed a limit, varying at different times and places. He might demand of the court an order to imprison his child, and in most cases the order of detention could not be refused. In the earlier days, we hear of sons who have passed well beyond the age of majority committed upon demand of parents. However, a decree of the Parlement of Paris² of March 9, 1673, decided that this right could not be exercised after the son had attained the age of twenty-five, and this rule seems to have been not without influence in the provinces of written law. Nevertheless, it should not be supposed that, even in extreme cases, the father was deprived of all authority over the son who was of age. If a noble of high rank, he could obtain a "lettre de cachet" from the king. It was thus, through a "lettre de cachet", upon his father's demand, that Mirabeau, then twenty-five years of age, was imprisoned in 1774 in the Château d'If. An ordinance of July 15, 1763, similarly decided that "parents whose sons have fallen into irregularities of conduct, capable of risking the honor and tranquillity of their families . . . without, however, being declared guilty of any crime, against which the law has provided a penalty, may demand of the Secretary of State for War and Navy their deportation to the Island of La Désirade. If the parents' reasons are found

¹ "The earnings of the child, or his wages, even at an advanced age, do not belong to him in his own right until the head of the family has made a gift of them to him, — 'si lo pair ne l'en avia faih do.' These are the words of the customary, in the oldest codification preserved to us, the text of our consular registers, dating from 1212." *Ibid.*, p. 22. We may also note that, when a child married, it was not he, but his father, the head of the family, who received the wife's dowry, gave a release for it, and managed it. *Ibid.*, p. 40. Cf. also, *Julien*, "Éléments de jurisprudence" (Aix, 1785), p. 72.

² [The "parlements" of the Old Régime were of course primarily judicial, not legislative bodies. Cf. *Brissaud*, "History of French Public Law", Continental Legal History Series, Vol. IX (Boston, 1915), pp. 343 *et seq.* For its legislative powers, *ibid.*, p. 445. — TRANSL.]

justified, the young men shall be conducted to La Désirade upon an order of the king, who charges himself, after their arrival at Rochefort, with all the expenses of their detention and support."

Without having recourse to such vigorous means, the father who had cause to complain of his son might also deprive him of his "legal share"¹ and exclude him from the succession by disinheritance. The right of disinheritance was not arbitrary, however. It could only be used upon just grounds, which were considered to be the fourteen causes mentioned in Justinian's 115th Novel. To marry without one's parents' consent, or at least before a certain age (twenty-five years in the case of daughters, thirty of sons), had been held by several royal ordinances to be another cause justifying disherison.

§ 3. **Changes in the Concentration of Family Ties.** — We may now measure the importance of the changes that have taken place in the organization of the family. A struggle that had long been waged between two conceptions ended in the triumph of one. Parental authority ceased to be a right created in the interest and benefit of him who exercised it, and became a simple power of protection, a means whereby the father might fulfill his duty toward his child. A fresh evolution began with the adoption of the Civil Code. Little by little all the logical consequences of this new principle became evident and were gradually given effect. The legislator has had necessarily to intervene whenever the duties which justified the father's exercise of authority were not performed, or whenever his rights were diverted from their purposes. To this necessity belong the laws upon obligatory education, upon the working of minors in factories, and for the protection of children who are abused or neglected.

Briefly, there is less authority and more kindness and affection; fewer lives are sacrificed to-day than in the former period. If equality of partition has not done away with the possibility of trouble between children, at least it has done away with many important causes of jealousy. The family has in fact concentrated rather than weakened.

When we consider the many sacrifices that parents impose upon themselves in every social class, in bringing up their children, in caring for their health and providing an education, in helping to establish them in life in such a manner as to secure a higher or better position than that enjoyed by themselves, we see clearly that family spirit is not extinct, that the State cannot hope to replace the

¹ See 34.

devotion and initiative of parents, and that any unjustified interference by it would arouse the liveliest resistance. The laws that have followed the adoption of the Code must give us no illusion. They show, it is true, that State intervention tends to increase; but they also fix the limit of that intervention. They are measures in protection of childhood; and it is precisely because childhood to-day inspires more love and solicitude than formerly, that opinion has risen against abuses that seem more revolting now than then. But most parents have a sense of their duty, and they are not disposed to yield their place to the State. Danger may even lie in the excess of affection, which Taine called "paidolatry." An only child often absorbs all the care, attention, and resources of its parents. And its careful education does not give results corresponding to the sacrifices it has cost, nor create health, energy, initiative, or sense of responsibility. In every organization, the spirit of sacrifice develops in proportion to what we give and selfishness in proportion to what we receive. The family does not escape this law. The instability of the middle class is a striking consequence.

II. INFLUENCE OF ENFORCED PARTITION OF ESTATES

§ 4. **Enforced Partition of Estates.** — Complex as our problem is, we remarked that there was need of viewing it under different aspects, studying independently each of the causes which may have determined an effect. Unfortunately social science accommodates itself ill to this method. In the natural sciences we may determine by experiment the action of a single cause. But society cannot be a subject of experimentation; we cannot isolate the causes whose action we would study, nor so arrange things that a single cause can operate to the exclusion of others. Let us suppose, as Gide has done,¹ that two countries are, during the same period of time, one under a policy of free trade, the other of protection. The first increases in wealth, the second is ruined. The experiment will not be conclusive. The result is not in fact due to a single cause. The nature of the soil, agricultural methods, the political system, the intensity of private initiative and energy, — all contribute to explain the result.

We shall therefore employ this method with reserve. Mistrusting ourselves and it, we shall inquire what influence three facts, economic in their nature, may have had upon the status and

¹ "Principes d'Économie politique" (6th ed.), p. 18.

condition of the family: enforced partition, the rise of the stock company, and the system of industrial labor.

According to Le Play's classification,¹ we may separate three principal types from the almost infinitely varied systems of inheritance. The legislator may exercise no constraint at all over the intent of the owner and leave him the right to choose freely the system of distribution that suits him. This is the system of *testamentary liberty*. Or, the State may intervene and regulate the transmission; the law will then obey one of two tendencies. It may aim to prevent partition of the estate, and endeavors by various means (right of the eldest son, exclusion of daughters, trust entails, the "majorat" ²), to insure transmission to a single person. This is the system of *enforced conservation*. Or, it may prefer to divide the estate among a large number of persons rather than transmit it integrally. In this case the liberty of the owner is restrained in the interest of the heirs as a whole. This is the system of the *reserve* and the system of *enforced partition*, which, with all their differences, present one feature in common: they both exercise a constraint upon the owner's intent. But the action is exercised in different directions: one encourages the concentration, the other the parcelling of the property.

In adopting this classification, it should be observed that it does not precisely correspond to reality. Most legislations have not established any one of these three systems absolutely. The English system is one of testamentary liberty, though it borrows something from the system of enforced conservation, for in certain cases it preserves the right of the eldest son. Certain other legislations admit a fairly broad testamentary liberty without such liberty being complete. How may they be classified? We hesitate to say; in any event the classification must always be arbitrary. Le Play proposed that all countries be regarded as adopting the principle of testamentary liberty when they permitted a property holder, regardless of the number of his children, to dispose of at least one half his property. Consequently the system of enforced partition merely implied that the disposable portion was less than one half. This is the system of the French Civil Code, which established a disposable portion varying according to the number of the descendants.

¹ "La réforme sociale" (6th ed.), Vol. I, chap. xviii, par. 3, p. 252.

² ["Majorat", an institution of the early law, was a perpetual and indivisible trust in land in favor of the eldest of the family. Cf. *Brissaud*, "History of French Private Law", Continental Legal History Series, Vol. III (Boston, 1912), § 513. — TRANSL.]

Let us now examine the effects of this system, its advantages and its disadvantages. Enforced partition (said its greatest adversary, *Le Play*), is primarily a dissolving agent. It disorganizes the family, destroys small land ownership, and decreases the birth rate.

§ 5. **Operation of Enforced Partition.** — To understand this institution, we must notice how it operates. Its action is not immediate; it is possible to arrest it for a certain time by custom or by evasion. Sustained by local tradition, peasant families endeavor to prevent the division of the inheritance. By agreement with all members of his family, the father transfers his land during his life to a chosen heir, charging him with the obligation of providing marriage portions for those who leave the family by marriage, or of aiding the others. But this customary influence can not long endure. Many persons, by disposition or interest, arouse the envy or cupidity of the heirs. The father then comes to an understanding with his chosen heir and endeavors to benefit him without the knowledge of the other children. He has recourse to gifts, to disguised donations; in the partition, appraisals are made below the true value of the property. But such frauds are easy enough to discover as a rule. A disguised donation may be exposed, by any proof available; or a gift in partition may be revoked on the ground of fraud, even after acceptance; or a renunciation of successorial rights may be annulled. In these controversies, the final word rests with the law; and the time is near when, through fear of litigation, no one will longer dare to risk such difficulties.

Enforced partition is bound to produce its effects. There are several possible alternatives. By a sale among the co-owners or by amicable arrangement a single heir may retain the property and charge himself with the payment of parts in money to the others; or, the property is purchased by a third person, the heirs dividing the purchase price; or there is an actual partition of the land.

(1) An amicable arrangement appears very much the best means of safeguarding the unity of the family and the preservation of the estate. But the burden assumed by the heir who retains the property is so heavy that it is generally impossible for him to support it. As a rule, the heir who desires to retain the land does not measure his own strength. The affection he feels for the land causes an illusion as to its value. In many parts of France the basis of the capitalization of rural income is upon a rating of thirty-three to one (that is to say, the value of the land is estimated at thirty-three times its yearly revenue); this corresponds to an

investment at three per cent for the purchaser; thus, land returning 1000 francs is valued at 33,000 francs. In such a case, let us suppose that there are three children, and that the child retaining the land has already received during his life, as an absolute gift, the legally disposable portion of the estate; he will have to pay to his two brothers together 16,500 francs as their share in the partition.¹ How can he procure such a sum save by borrowing upon mortgage? He contracts the loan ordinarily at five per cent; but the notarial costs, revenue tax, and the charges for recording, which must be added, make it considerably more burdensome. Thus we have an instance of one obliged to pay out annually a sum roughly equal to the revenue from the land retained. It is only by a miracle that he succeeds in getting a living and meeting the interest. How may he hope to succeed by any amount of toil, in putting aside marriage portions for his children and in reimbursing the principal of his debt? The year comes when the debt falls due; the season has been bad, or some other misfortune has befallen; foreclosure is inevitable, with its customary train of expenses, humiliation, and, in a time of depression, the necessity of a sacrifice sale. This, then, is the end; to this he has come, as the years decline,—misfortune, long-suffering, overwork, his life a sacrifice.²

(2) Better certainly that he resign himself to the second method: an immediate sale of the land and division of the purchase price. This practice has prevailed in certain parts of France, notably in Normandy. As in the preceding case, so here, also, enforced partition leads to the destruction of small rural land-holding. The heirs of the former owner fall to the rank of lessee-farmers or “metayers”, or try their fortune in the cities.

(3) A last alternative remains: an actual division of the land. In appearance it is the simplest solution, but it is not the least unfortunate. The number of owners is increased, but the working of the land is rendered impossible. An agricultural establishment presupposes, in fact, buildings, animals, agricultural instruments, and a certain amount of land. The value and the utility of

¹ [In the example the testator would be legally allowed to dispose of one fourth. This he gives his chosen heir. The remaining three fourths go equally to the three children; here the heir gets one third; his whole interest being, therefore, one half. But as he takes in fact the whole property, he must pay his brothers one quarter each or 16,500 francs in all. — TRANSL.]

² Cf. *LePlay*, “La réforme sociale”, Vol. II, pp. 212–225; *C. Jaunet*, “Le socialisme d’État et la réforme sociale”, p. 461. See also the investigations into the condition of families and the application of the inheritance laws, published by the “Société d’Économie Sociale.”

these different elements result from their union; they disappear when separated.

If the buildings are given to one heir, they will be out of proportion to the diminished operation, while the other heirs will fall into debt in erecting new constructions on their portions. A physical allotment of the home and dependencies creates other difficulties. It condemns persons, who are desirous of keeping their interests separate, to live together in a sort of ill-defined community-life, — a cause of inconvenience and a permanent source of friction and disagreement.

The same disadvantages ensue from a partition of the land. The division of the orchards, pastures, and fields, which were suited to the needs of a single family, places the owners in a condition of reciprocal dependence, renders the use of machinery impossible, and reduces part of the soil to unproductiveness by uselessly multiplying the number of fences and ways of access. Forced to seek additional income, the small land-owner hires out his services and so ultimately falls into the class of wage-earners. The fear of this descent from their economic class inspires parents in too many instances to adopt a deplorable means of prevention. Forbidden the right to favor the eldest child, a large family is avoided; families have but a single heir. In this way enforced partition exercises a depressing influence upon the birth-rate.

What value have the foregoing criticisms? They contain some truth, certainly, but also much exaggeration.

As to the birth-rate, it is well known how uncertain is the determination of the causes of its falling off. Many may be cited, which act together: the custom of the marriage portion; the high cost of living; increased luxuries and comforts; the encumberment of public offices and liberal professions (access to which, as it becomes more difficult, tends to raise the age of marriage); finally, surprising though it may seem, the want of emigration. Whatever may be the relative influence of these various causes, we are justified in thinking that the operation of the inheritance laws is in reality secondary. We need only note, first, that in certain countries where the system of the French Code is in force (in Belgium and in the Rhenish Provinces before 1900, for example), the birth-rate has not decreased; and, secondly, that the tendency to its decrease in France dates from a much earlier period than the adoption of the Civil Code. For a long time, notably from 1830 to 1846, the birth-rate of France almost equalled that of other countries of Europe.

Similarly the influence of the inheritance laws upon the destruction of small ownership has clearly been exaggerated. When the influences of the Civil Code are attacked as injurious, many things are forgotten. In the first place, equal partition existed in our early law in the case of persons beneath the noble class; testamentary liberty was not much greater than it is to-day. The legal share (" *légitime* ") ¹ was as a rule one-half, but in the case of certain property the law required a very large reserve. Thus a father might dispose of only a fifth of his separate estate. Most of the Customs did not admit of absolute gifts " *inter vivos* " in favor of a descendant who was an intestate heir. Finally, testamentary liberty was often curtailed by trust-entails. It must, then, be recognized that, in a general way, liberty is less restricted and more respected to-day than it was both under the Revolution and also under the Old Régime.

In the second place, there is every reason to believe that peasant ownership is not condemned to disappear. It represents about one-fourth of the land in France, and tends to increase, though rather slowly. At least it reëstablishes itself in proportion as the land is sub-divided. Very gradually, the commercial class abandons possession of the soil and ceases to regard land as an investment. Land ownership no longer carries the social influence that it once did; the rise of movable wealth has created a great rival. More and more the exploitation of land is coming to require a present and enlightened attention. In this way, many large and medium estates have been parcelled among the peasants.

And, lastly, there appears no doubt but that equality among descendants is demanded as the only solution conforming to our notion of justice. The increase of the disposable portion might sometimes ease the situation of the favorite, but it would notably injure that of the other children. Suppose an inheritance of 40,000 francs, and five children; if one half be disposable, the favorite might get fr. 24,000, but each other child fr. 4000, or only one sixth as much. The school of Le Play, which advocates, as its special feature, a strong family organization, is unable to deny the fact that this condemns to separation all those children not permitted to live on the family estate. The chosen heir establishes himself on the land of his parents and lives as they did. But what becomes of the others? We need have no illusion that, in the present state of our society, they will consent to live with the

¹ [A Roman survival in the provinces of written law, providing a maintenance for the children out of the movables of the deceased. — TRANSL.]

eldest son in a position of inferiority which (as Cauwès says ¹), is in a way that of domestic servant, without wages and usually condemned to celibacy. Since they received only a diminished part and this in money, nothing attaches them any longer to the family lands. A life passed continually in the sight of the injustice which they believe they have suffered adds to the attraction of the cities and induces them to depart. Some, no doubt, succeed; but the majority go to swell the ever-rising wave of the indigent and fallen. We must, therefore, accept as a necessity the principle of enforced partition.

§ 6. "**Hofrecht**", "**Homestead**", "**Arrondirung**." — Is it not possible at least to lessen these dangers? Numerous measures have been proposed to this end. Some aim to fortify the father's authority by different means; others to assure by law the preservation of the home and the stability of the family. To preserve the integrity of the home, an effort has been made to borrow from three institutions found in foreign legislations: the "homestead", the "hofrecht", and the "arrondirung", — the first employed in the United States, the two others in parts of Germany.

Under the name of "homestead exemption law", are designated those legislative acts the effect of which is to place the home and a certain extent of appurtenant land out of reach of creditors, and to subject their alienation to certain conditions tending to restrict the owner's right. In France the Act of July 12, 1909, authorizes the creation of a "family land" unattachable by creditors. Any land, not exceeding 8000 francs in value, may be constituted "family land." The creation is effected by a notarial declaration, a will, or gift. The creation of the "family land", which is subjected to a certain publicity, must be ratified by a justice of the peace and recorded within the month following the ratification. Prior creditors may preserve their rights by filing their claims. Subsequent creditors can attach neither the land itself or its fruits. The owner loses the right to mortgage it, while preserving his right to alienate it, or to renounce the effect of the law within certain limits.

The "hofrecht" is an institution intended to facilitate the undivided transmission of rural property. Like the "homestead" it aids in the preservation of the estate, but instead of operating during the life of its creator, it produces no effect until his death. In certain parts of Germany, notably Hanover, the farm ("hof") is not divided among the descendants; it is given as a whole to a

¹ "Cours d'Économie politique", Vol. III, p. 471.

avored heir called "anerbe." Certain laws give the father the right to designate this heir. Others leave the choice to the children and, in case of disagreement, to the "family council." Most laws expressly name the eldest son, and in the absence of sons, the eldest daughter; a few, on the other hand, favor the youngest. Ordinarily the system of the "hof" is conditioned upon a declaration of intention by the father; he must make his purpose known by describing the property which he would exempt from partition upon a special register called the "hofrolle." The German Civil Code has allowed these local particularities to survive in the law of rural inheritance, leaving it to the States of the Empire to legislate upon the matter.

Lastly, "arrondiring", or enforced exchange, proposes to prevent an excessive division of land. It is a means by which the administrative power of the government unites in one whole all the lands of a municipality, and then allots to each proprietor an unbroken domain corresponding in value to the numerous and scattered lots which had previously belonged to him.

Without discussing these institutions, we admit that the reforms seem to us difficult of application or but slightly effective. There was a time when much interest centred in the "homestead." The article by Paul Bureau, the reports and notices of Levasseur,¹ and the discussions by the "Société d'Économie Sociale",² have shown beyond doubt that the enthusiastic partisans of this institution had many illusions about it. The reform runs the risk of being illusory if restricted, as in the French Law of 1909, to declaring the property unseizable, without taking from the owner his right of alienation. If the law goes so far as to declare an absolute inalienability, it opens the way to very serious disadvantages. A sort of marriage portion system is created, extending to the property of the husband, which deprives the very person whom it is intended to protect of credit and initiative and every sense of responsibility, and yet renders the services of the lawyer more indispensable and onerous.

The "hofrecht" would arouse in our country those protests that have always been provoked by efforts to restore the right of the eldest son. Experience proves that this system is only possible when it conforms to tradition and is acceptable to general opinion.

Finally, the system of enforced exchange may be possible in Germany where the people are accustomed to a patriarchal form of

¹ "Académie des sciences morales", Vol. XLII (2d half, 1894), p. 558.

² "Réforme sociale" (2d half, 1894), pp. 71 and 226.

government and where the idea of collective ownership has left important traces. We need but little acquaintance with the French peasant to estimate the resistance that such a measure would surely excite amongst us.

§ 7. **Restoration of Parental Testamentary Power.** — We shall not delay long over the study of the numerous projects which have aimed to restore the authority of the father. We may say, without enumerating all, that they consist chiefly in enlarging the disposable portion of the estate, in granting the liberty to effect family arrangements, and in the reëstablishment of disinheritance.

(1) *Enlargement of Disposable Portion.* — We have already discussed the problem of enlarging the disposable portion. The reform would seem futile, were it possible; for the disposable portion is no longer taken advantage of to-day. The ideal of equality has so entered into our customs that the father would not exercise the powers given him. In addition, the reform is impossible, because it is too manifestly contrary to public sentiment. A democracy founded on equality will always pronounce consistently against such a measure. As Laveley said,¹ there is incompatibility between democracy and the testamentary power.

(2) *Liberty of Family Arrangement.* — Under the rather vague title of "liberty of family arrangement" is understood the power given the father, on leaving to his children an undivided reserve, to take all the necessary precautions to secure an easy regulation of his succession.

With this object the Civil Code introduced partition by the ascendant, permitting the father to effect the distribution of his property by donation or will. Much was hoped of this institution. It was thought that in many cases the disadvantages inherent in the law's partition of an inheritance would be avoided. This hope has too often proved vain.

Instead of insuring the comfort of the last years of the parent who has despoiled himself during lifetime for his children's benefit, his partition abandons him to their ingratitude. The heart-breaking situation of the peasant who has distributed his property and is reduced to beg for the modest income, reserved to himself but unpaid, or who (and this is indeed worse) must support the bitterness and humiliation of a life in common with them, has often been described. It is unfortunately not the exception.

And at the same time, it seems that, far from avoiding litigation, a

¹ "Le gouvernement dans la démocratie", Vol. I, bk. VI, chap. XII, p. 307.

distribution by the parent is best fitted to excite it. We may judge of this by the number of cases to which it has given rise and by the important space that it always occupies in the law reports. We have to recognize that, in the actual state of legislation and decisions, this mode of partition offers no security. No matter with what good faith it is performed, it does not escape the risk of being invalidated. A consequence is the ruinous expense of lawyers' fees, the failure of credit in the donor, or the destruction of the rights of third persons.

Of the two evils pointed out, the first results from the institution itself, whatever its mode of organization. It has ever been a subject of criticism, but it will not be by reforming the law that the evil will be remedied. The legislator has done everything possible by subjecting distribution "inter vivos" to the ordinary grounds for revocation of gifts, that is, ingratitude and failure to carry out the attaching trusts. The rest must be a reform in conduct.

The second evil is avoidable. But the courts seem to have set themselves to aggravate it. Without entering into detail, let us review a few of the rules of their decisions.

The first requires, as a condition of validity, the observation of Articles 826 and 832 of the Civil Code, which provide that, so far as possible, the same quantity of movables and immovables or choses in action, or securities of like nature or value, should be apportioned to each lot. Thus an arrangement by which a father gives all his lands to one child, charging him with the payment of sums to his brothers and sisters, constitutes a ground for annulling such a partition.¹

A second and recent rule prolongs the insecurity of a distribution "inter vivos" by fixing the date from which all actions to annul may be brought, and from which the prescriptive period runs, as that of the parent's death.

Thirdly, in case of the invalidation of a distribution on grounds of fraud, the rule declares that the existence of fraud must be tested by the value of the property, not at the time of the gift, but at the moment of the parent's death. Thus, one of the several donees, who received a portion, strictly equal to the portions of the others but later suffering a depreciation by some accident, has a valid claim for rescission.

All these causes of uncertainty may be directly ascribed not to the law itself, but to the manner of its application. As it is hardly possible to look for a change of view by the courts, the demands of

¹ Cf. Cassation, Feb. 25, 1878; *Dalloz*, 1878, 1, 449.

Le Play's school of publicists, who have insistently sought legislative reform, seem to us wholly justified.

Would it not be preferable to go still farther and (with Claudio Jannet) abolish the rescission of contracts affecting a future inheritance and permit the heir to the reserve, at the will of the decedent, to be allotted a reserve consisting of specific property or money? A contract affecting a future inheritance, said Jannet, may be useful in facilitating the marriage of daughters or in encouraging emigration. "A sum of money, given twenty or thirty years before a parent's death, has far more value to a newly established household or to the emigrant than a right of inheritance, the realization of which is distant and uncertain."¹ We are tempted to believe that a gift given as an advance adequately satisfies such needs. The practice of renouncing rights of inheritance has left such unpleasant recollections, and encouraged so many odious calculations, that its reestablishment seems in no way desirable.

On the other hand, we could not see without apprehension the introduction into our law of the principle of the German Civil Code, by which the reserve is demandable, not in specific property, but in value. Is it not practising a sort of exclusion of a child to treat him not as an heir but as a creditor who is got rid of with a little money? Would it not suffice to recognize a father's right to allot to each child the portion which seems most suitable? For the legislator, the problem consists, therefore, not in abolishing the distribution "*inter vivos*", but in simplifying it and rendering it less onerous. We regard as very fortunate from this point of view the partial reform introduced by the Law of November 30, 1894, governing tenements for the poor. That law puts a limitation upon the rule that each heir may always demand immediate partition. It permits the allotment of the house, after appraisal, to the surviving husband or wife, or to one of the heirs, even if there are among them persons lacking legal capacity.

(3) *Disinheritance*. — One of the severest criticisms directed against the rule requiring a reserve is that it releases the son of all obligation of respect or gratitude, by vesting him, regardless of his behavior, with the certainty of some day coming into his parents' fortune. He may with impunity neglect all his duties toward them, use them in the basest manner, humiliate them shamefully; but it matters not; he remains their heir.

The sole means of ending this scandal is to reestablish some of the causes of disinheritance recognized by the early law. The draft of

¹ "*Le socialisme d'État*", p. 475.

the Civil Code preserved disinheritance in a certain measure, by permitting at least an (unsanctioned) exclusion of children that were "notoriously dissipated"; and there are still several text-writers, among those who defend the reserve, who are not hostile to the principle of disinheritance for cause.

We believe that it would be at least desirable to increase materially the number of instances where an heir might be legally declared disqualified to inherit. Several causes of disinheritance recognized by foreign codes¹ could be transformed into disqualifications to inherit. They would perhaps be the condition and consequence of marriage reform; while freeing it from family pressure, while releasing the son from the necessity of having the parents' consent, the latter would be allowed to leave him nothing.

Our conclusions may appear very modest in their recommendations. We do not claim that we envy nothing of the past, but we do believe that it cannot be revived.

The family has felt very deeply the influence of those principles of equality and liberty that have modified society itself; and that is why the question of testamentary liberty has always been considered a political question in France. Many measures, in themselves good, but having, or appearing to have, as their object, a return to early family organization, would meet with unpopularity and provoke an irresistible current of opinion against them.

III. THE CORPORATION AND THE FAMILY

§ 8. **Results of the Corporation.** — During the 1800s, the corporation has become the instrumentality of large-scale industry. By the division and limitation of liability, and by its appeal to the public at large, it has made possible the concentration of capital. For gigantic railroad undertakings, canals, factories employing thousands of workmen, it has furnished the resources unprocurable through partnerships of persons. Through the expectancy of a rise in value of the stock, and the facility offered to market it, this form of company has awakened the spirit of speculation. To the economists of the liberal school it appeared as the final form of industrial organization. But against this exaggerated admiration, a reaction has gradually set in. It has become apparent that this sort of association was imperfect in many ways. It no doubt

¹ Civil Codes, Spain, Art. 853; Portugal, Art. 1876; Germany, Art. 2333; Switzerland, Art. 477.

answered the needs of the moment better than the others. One is surprised, however, on reflection, that it should have been able to produce results of such importance.

Has it brought workingmen and capitalists together upon any common basis, in so far as the former, as Gide says,¹ are "laboring in an enterprise whose profits they do not reap, the latter reaping the profits from an enterprise in which they do not labor"? Properly speaking, there is no association among the stockholders themselves. They are strangers to each other, knowing nothing of each other, often even knowing nothing of the enterprise in which they are concerned.

Not only does the corporation involve a great loss of forces, in that it does not realize a reconciliation or fusion of interests, but it is also notably dangerous. Who shall say what abuses it has committed, what ruin it has accumulated? "Whatever may be the social advantages introduced by the stock company," wrote Ihering,² "the malediction it has raised exceeds its praise. The disasters it has brought to private fortunes are graver than if fire, water, famine, earthquake, war, and invasion had been conjured up to ruin the national wealth." Paul Leroy-Beaulieu³ judges them no less severely. "What once were in the earliest Middle Ages the great companies of adventurers and brigands, ransoming merchants and pillaging the country, the stock company is to-day. Not all, no doubt, but many of them; and they proceed with more security, more impunity, more leisure and enjoyment for their promoters and directors. It is a legal and methodical method of pillage."

If the stock company has made easy the saving and investment of money in the labor of others, it cannot be disputed that it has squandered and dissipated an enormous mass of capital. There has been no complete study of this, but innumerable particular instances may be cited. The Panama Company drew from the country's savings about fourteen hundred million francs; it expended in useful work about a half, and the stockholders were to be congratulated when the enterprise was taken over by the American Government for two hundred millions. An analysis has been made of a loan of one hundred and fifty-nine million francs contracted by Honduras. The actual work, which was the pretext for the loan, consumed only eighteen millions; bankers' commissions

¹ "L'Avenir de la coopération", p. 9.

² "Évolution du droit" (French trans. by *Meulenaere*), p. 152.

³ "L'Économiste français", July 3, 1881.

and publicity absorbed seventy; it has not been possible to ascertain to what the remaining seventy-one millions was put.¹

§ 9. **Effects on the Family.** — What influence has the stock company had on the family? It has given rise among property holders to a differentiation of class. On the one hand is an amorphous class, scattered, condemned to a passive process of economy, without initiative, solicited by circulars, newspapers, and banks; when their investment turns out well, they regard themselves as privileged in having received a small portion of the profits; should it turn out badly, they lose all. On the other hand, there is a small group, promoters and directors of enterprises, employing to their profit the scattered forces, enjoying uncontrolled direction, rendering the majority of the stockholders subservient, and often also the technical management. A small number of persons employed in the issue of securities along with the corporate officers divide the benefits of the management. Merely opening a financial almanac, we perceive the same names repeated again and again on most of the boards of directors. Speaking of the past only, a certain Pereire was a director of nineteen companies, representing a capital of four billions; ² a single family had in its control fifty companies. In 1863 one hundred and eighty-three persons guided the destinies of a number of banks, canals, and manufactories whose capital exceeded fifty billions of francs. In this way the corporation has powerfully developed family influence.

The upper business class, especially of the period about 1830, profited by the impulse given to all these great industries. This class furnished the personnel of the direction of most of the companies, and its influence has survived the conditions that favored it; it persists even to-day. To this original class has been added a new personnel borrowed from subsequent periods, the Second Empire and the Third Republic. To each in-comer a small part had to be yielded. Financial power, nevertheless, still rests, in large part, with the early families, whose fortune is in most instances of fifty years' standing. They are in a true sense families of directors: father, father-in-law, son-in-law, son, nephew pass from one company to another, sometimes as auditors or examiners whose

¹ *B. Malon*, "Le socialisme intégral", Vol. II, p. 235, no. 1.

² *Georges Duchêne*, "La spéculation devant les tribunaux"; *B. Malon*, "Le socialisme intégral", Vol. II, p. 234. *F. Delaisi*, in "La démocratie et les financiers" (Paris, 1910, pp. 43-59), drew up a table of what he calls the "general staff" of capitalism, fifty-five names in all, who direct nearly all the large banking, insurance, transportation and mining enterprises.

function is to keep watch over the directors, though in reality they are chosen and named by the latter. These purely empty functions, formalities, represent practically no useful return or labor. In reality all that is done is what may be accomplished about a table, listening to reports, engaging in discussions without preparation and with a very inadequate knowledge of the business, and a lack of time and personal fitness. Once or twice a year, what purports to be an inventory is drawn up, amounting merely to an enumeration prepared by employees. Business relations are formed with companies, created in the interest of the directors, to increase their profit or their importance. We frequently see one company exploited by another, a factory by a bank, a street railway by a construction company. Often on a board of directors one or two members in reality represent all the rest; their influence is exclusive; they choose or set aside whoever is pleasing or displeasing to them. Sometimes, in certain partnerships limited by shares, the manager is named for life with the right to designate his successor. A factory is handed down like a farm, to a relative by blood or marriage, who may be a total stranger to the sort of industry he is directing.

It is not unusual to see a business turn out badly or only fairly for the stockholders, but very satisfactorily for its directors. Once a year a meeting of the stockholders is called. It is a mere reunion, often of but a few people, who do not know each other, have been unable to concert any action, who listen to the reading of a report informing them only of what the directors want them to know; the meeting is adjourned by a vote of approval and congratulation of the directors. The stockholders ask only dividends and are fully satisfied when they receive them; when none are paid and the business begins to turn against them, they content themselves with hopes and expressions of sympathy. Once in a while some effort at resistance is aroused. A discontented or unfriendly stockholder interrogates, demands explanations. Ordinarily he arouses the others' mistrust. The president answers deftly or sharply; when the danger becomes more threatening, the board of directors adopts an energetic means of defence. They distribute among accomplices large blocks of their stock, when by the by-laws they have only a limited right to vote. By proxies, by purchases, by grouping holdings, the miracle of multiplying votes is performed. When the business is a total failure, liquidation begins, with its train of expenses, its interminable details. Intelligent stockholders carefully avoid attending the meetings

to which they are called, saving themselves the time. At intervals a few meagre dividends are distributed; the affair sinks into oblivion. Often, at the moment of disaster, feeling runs high against the directors; they are threatened with prosecution and suits. But they have been forehanded and assigned all their property. The fortune popularly attributed to them no longer exists; it has become liquid, and then vaporous. The receivers advise a compromise, the stockholders end by accepting it.

Thus Professor Thaller's conclusion is justified. "One thing," he says, "stands as patent in the spectacle that the stock company displays to observing eyes. The company is fleeced by a handful of financiers or business men who behave toward the stockholders as though they were a gang of slaves under their lash, — easy to blind by prospectuses or optimistic reports, and robbed of any real share in the enterprise which has been formed by their capital."¹

§ 10. **Proposed Reforms.** — Are these evils inherent? Is there a possible remedy?

The question has frequently been studied and discussed. It has been the object of numerous legislative proposals, reports, and serious investigations. An extra-parliamentary commission, appointed in 1902, reached a few very temperate conclusions. The reforms which it demanded, though timid, have not even been realized. All that was done was to adopt a few provisions embodied in the budgetary law of 1907 regarding publicity in the issue of corporate securities.

And so the entire difficulty remains. It is impossible to consider returning to the system prior to 1867, when the creation of stock companies was conditioned upon an antecedent approval of their by-laws by the government. To place upon the government the responsibility of weighing the opportunities and chances of success of the undertaking, is to impose upon it a function for which it is not suited. Its judgment risks being arbitrary and prejudiced. Feeling itself responsible for failures, it will naturally tend to be too distrustful, and to misconceive the value of an invention or new idea. Would it not at least be possible to lessen the evil of the old system by replacing the requirement of a prior approval with a simple ratification? According to some the government, according to others the courts, should inquire whether all the essential formalities have been observed. Such a plan presents

¹ "De la réforme de la loi des sociétés par actions", in "Revue politique et parlementaire" (Jan. 10, 1903), p. 91; "Syndicats financiers d'émission", in "Annales de droit commercial" (1911), pp. 5, 34.

many objections. If the examination is effective, we return covertly and indirectly to the old system of prior governmental approval, and if limited to verifying the accomplishment of certain formalities, the ratification offers but a very limited usefulness.

(1) *Publicity*. — The liberal school of economy, which opposes in principle every restrictive system and accepts regulation as a choice of evils, strongly advocates publicity; publication “in extenso” of the by-laws in some predetermined newspaper; declaration in the prospectus of the proportion of capital subscribed otherwise than in money; annual publication of balances. Certainly publicity is not without advantages. It is especially useful at the time of the issue of the stock; it furnishes information upon the history and cost of organization of the undertaking, the more desirable in that many enterprises are not thrown open to the public, because of the part played by banks. However, we must not suffer too great illusion. Fraud will not be thus prevented; the matter published will be but partly true; the real promoters will at times conceal their identity behind straw-men.

It might be possible to increase the powers of the stockholders’ meeting. But from this also we may not hope too much. Improvement does not depend upon legislative reform, for frauds are difficult to check. To prohibit the directors from participating as stockholders in the meetings charged with the approval of their management, is to tempt the director, who is a large stockholder, to retain in his own name only the minimum required by the by-laws, and to have the rest issued to bearer or in the name of a friend who will move him a resolution of thanks.

(2) *Expert Examiners*. — Professor Thaller believes that but one reform, the appointment of expert examiners, would be productive of practical results. “The desired law,” he said, “must be hung upon some peg. The peg upon which the Law of 1867 hung was the liberty of organization of the stock company; that of the Law of 1893 was the untransferability during two years of stock representing subscriptions other than money; the peg of the new law, if we are not mistaken, must be the principle of expert examination by disinterested persons.”¹

Analogous institutions already exist in England and Germany. In Germany the Law of 1884 and the Commercial Code of 1897 provided for examiners, chosen by the chambers of commerce and associated into a body. Their aim is to supervise with competence and independence the creation and working of stock companies.

¹ “Revue politique et parlementaire” (Jan. 10, 1903), p. 124.

On the organization of the company, they verify the facts stated in the report to the first stockholders' meeting; if subscriptions have been paid in other forms than cash, they verify the appraised value. During the life of the company, they may be appointed at the annual meeting, on the request of stockholders representing one tenth of the capital, to examine the books. In England there exist several associations of expert accountants. Their intervention is not obligatory, but they enjoy great public confidence. The great commercial companies and houses have frequent recourse to them to settle a dispute or verify a financial situation.

A body very similar to this has been proposed for France. It would constitute a new class of administrative officers. Some uncertainty exists as to what powers would be conferred upon them and from whom they would receive their power, State, courts, or chambers of commerce. Thaller believes that their intervention would be especially useful on the final and legal constitution of the company, when its securities are placed upon the market, and again at the time when the accounts of the directors are presented. Many frauds and abuses are committed when the company is created. The law requires that the capital be entirely subscribed and that at least one fourth be paid in. The promoters must go before a notary and declare that these conditions have been fulfilled, but nothing establishes the truth of the declaration. Stock subscriptions in property and the privileges voted to certain stockholders are examined by a committee appointed by the first stockholders' meeting. After their report, a second meeting is called to pass upon the appraisals made. But these precautions are quite insufficient. The committee, devoted to the promoters' interests, give an obliging approval of many over-valuations and unjustifiable preferences. A large distribution of special rights in profits carries in its train all sorts of conflicts of interests. Companies are in this way burdened with excessive initial charges which do not allow them to develop or sometimes even to survive. The employment of expert examiners might serve to prevent these abuses, enlighten stockholders, verify statements, secure honest appraisals, and make possible a fair weighing of the risks and probable chances of the new company.

Formerly the public appeal generally preceded the formation of a company by the opening of subscriptions for stock. To-day promoters show a marked tendency to form the concern out of a small coterie. They first divide the shares among themselves and then turn to the public whom they get to purchase the stock at a higher

price, keeping for themselves a more or less large premium. Here again the door has been left wide open for fraud, and an enterprise, in itself good, may become objectionable to shareholders when the conditions have been such. Certainly it would be desirable if expert examiners could separate the true from the false, place affairs in their exact light, verify the accounts of the company's formation and keep the public advised. Lastly, the directors are obliged to call annually a general meeting and submit an account of their management. The resolutions passed are determined by the showings of the inventory and balance. But the inventory may be falsified; the balance sheet is always obscure and sometimes falsified; the materials, merchandise, accounts collectible, may be the subject of overvaluation. The only guarantee which the stockholders have is the control exercised by the board of examiners of accounts, named the preceding year. But their nomination is made upon proposal of the board of directors. The board of examiners of accounts, the function of which is often merely to serve as an entrance to the board of directors, has not the authority or independence that it should have. A verification by experts might be more serious.

It is our hope, therefore, that the experiment will be made in France. But experience alone will justify our passing judgment. With how much conscience and ability would the position be fulfilled? It would certainly be difficult to gather together in a day a body of talent both honest and capable. We cannot help but feel regret at the creation of a new class of governmental officers or intendants, imposing fresh charges upon companies for their services, when their administration is already so burdensome. However, some action is necessary. As Schmoller has observed, there is in the abuses committed by stock companies a form of economic injustice that ought not to be tolerated. No doubt a majority of these abuses inheres in the institution itself, in the nature of this sort of association. These at least must be corrected, while waiting for the time when they may be replaced or when we can do without them.

IV. THE INDUSTRIAL SYSTEM AND THE FAMILY

§ 11. **Present Industrial Organization.** — The characteristic sign of our present industrial organization is the assembling of the workmen in great factories, run by motive power. In these factories the workman has become a subsidiary, an auxiliary to the

machine. Attention and nervous force is demanded of him rather than physical force. For that reason work by women and children has been utilized, and their position has become the more important in that they are content with a smaller salary, serving as a mere complement to the adult worker's. We do not mean that the labor of women and children is an absolutely new phenomenon. Numerous instances collected by Roscher and LePlay show that "the imposing of excessive tasks upon women and children long antedated machinery."¹ But, until the rise of large-scale industry, their employment remained exceptional in character. From the latest statistics, the census of industries and professions, we learn that the proportion of married persons in the entire body of workers and employees is 42.6 per cent for men and 23.8 per cent for women.

Experience soon showed that the law could not rest indifferent to such a situation. Women and children too often became victims in being subjected to excessive work, or to work at too tender an age, or during prolonged periods, endangering their life or their health. Numberless sad evidences of these abuses have been collected in Belgium, where the principle of liberty of contract, of "laissez faire", continued to exist until the Act of December 13, 1889. That law was, in fact, adopted as a result of the official investigation that had revealed the abuses. The report of this investigation mentions cases of children of five or six years of age employed in tobacco factories; and others, but little older, who worked twelve, thirteen, and fourteen hours a day. A witness is reported to have testified that he had seen children (their names are given) "working from fifteen to eighteen hours a day at the age of ten"; and he added: "No one knows how many died as a result of those fifteen to eighteen hours of work in the suffocating dust of the linen."² From the same report we read: "A manager of a glass factory, president of the association of Belgian Glass Workers at Charleroi, admitted that in his industry apprentices of fourteen and sometimes younger worked twenty-four hours without interruption. Another manufacturer, director of a cotton mill, testified that the legs of children were sometimes deformed because they had to remain standing during the long period of their work. Senator Lammens, member of the commission, declared that, from a calculation made by him, it appeared that the children

¹ *P. Leroy-Beaulieu*, "Traité d'économie politique", Vol. I, p. 431.

² Investigation, Vol. II, D, nos. 2,337, 2,339, cited by *Raoul Jay*, "Le travail des enfants et des femmes dans l'industrie", and "Protection légale du travail" (1910), p. 31.

employed by brick makers, whose task was to pile the manufactured bricks given them, walked in so doing as much as forty kilometers a day.”¹

Similar abuses and excesses were shown to exist in the work by women. In 1844 Lord Ashley declared in the House of Commons that out of 418,590 workers, 242,000 were women, half of whom had not attained eighteen years of age. Rapidly worn out, after thirty-five years of age such women were unfit for service. If married, they work in the shops until the last hour before childbirth and return the following day. The children are confided to elderly aunts or to grandmothers, who have not raised their own children and know nothing of the cares needed. The tears of these working women are assuaged with opium. The want of sanitary precaution in artificial nursing causes a high rate of mortality.²

§ 12. **State Intervention.** — Under such conditions it is evident that the employment of women and children is destroying the workingman's family; home, family life, no longer exist. As some of its members set out for the factory, others return, their task ended. The wife and mother can be of no help in the home; she cannot cook, wash, mend, nor watch and raise her children.

It is the spectacle of such abuses that has inspired a progressive regulation of labor. Reforms have taken place, one after another, singly and reluctantly. Often ineffective or incomplete, they have made frequent amendments necessary.

The legislator intervenes to impose certain conditions relative to the age of entering employment, the nature and the duration of the work. These conditions are obligatory; they constitute, therefore, so many derogations from the principle of liberty of contract. Everyone to-day admits the justification of the law's intervention in protection of minors. But still a division of opinion becomes apparent when it is a question of regulating the working conditions

¹ Investigation, Vol. II, cited by *Raoul Jay*, “Lois nouvelles” (1889), I, p. 450.

² For English investigations, cf. the well-documented article by *Jacques Dumas*, “Les lois ouvrières devant le Parlement anglais”, in “Revue d'économie politique” (1896). Dumas cites from the investigations the depositions of several children. Of these we quote one taken at random, p. 31: “Elizabeth Bentley . . . I began to work when I was six years old. In the shop where I was, we worked from 5 o'clock in the morning until 9 o'clock in the evening when pressed. In ordinary times, the hours were from 6 o'clock in the morning until 7 o'clock in the evening. They let us have forty minutes for our noon meal, but the work did not stop for breakfast or for lunch. . . . When there was a great deal to do, we could not even eat, and, if we did not take our food away with us, the foreman took it to feed his pigs.”

of women, and it is naturally the regulation of the employment of adults that meets the greatest difficulties.

(1) *Child Labor*. — The development and importance of this body of law, to which has been given the name of “labor legislation”, is well shown by a comparison of the different measures aimed to fix the age of the entrance of children into factories. The earliest law, that of 1841, timidly fixed the minimum age at eight years. Such a measure seems miserably inadequate to-day. When in 1868 Jules Simon published his book “*L'Ouvrier de huit ans*”, the title alone was an appeal to public compassion. The law of 1874 effected a great progress by prohibiting, as a general rule, the industrial employment of children before the age of twelve. It was authorized exceptionally at ten years, but only in certain industries and for a day of six hours, broken by a period of rest. The Law of 1892 took a further step in the same direction. Article 2 declared that children should not be employed or admitted into shops before thirteen years of age.

There is evidently something arbitrary in all these provisions. We perceive, nevertheless, that this is due to endeavoring to reconcile the regulations as to the hours of labor of children with those of the law upon obligatory education. The child is not allowed to enter the factory until he is released, by reason of his age, from all the obligations imposed by the school law. But this rule is subject to two classes of exceptions. If primary and manual instruction are given in the same building, the child under thirteen years may be put to manual labor provided that his period of work does not exceed three hours. We know that after eleven years of age the child may be authorized to leave school if he has obtained his certificate. In the course of the discussion upon the Law of 1892, Loreau, a deputy, proposed that children over twelve years, possessing certificates of study, be admitted into the factory. The amendment was presented as a sort of compromise. It was opposed, though in vain, by de Mun, who pointed out that a scholastic examination should not serve as an exceptional reason to authorize work prematurely, but that on the contrary both constituted dangers, a double source of over-strain. The amendment was adopted.¹

While permitting these exceptions (the last of which seems to us regrettable), the authors of the Law of 1892 desired by a precautionary measure to stiffen the guarantee, often insufficient, secured by the age of admission. A child, even at thirteen, may be unde-

¹ Law of Nov. 2, 1892, Art. 2, § 2.

veloped or in a condition of health such that work in a factory would be dangerous or fatal. To avoid this danger, the law declares that no child less than thirteen may be admitted to work unless provided with a certificate, testifying to his physical ability, secured from the physician in charge of this department of public service. Moreover, the inspectors of labor may always require a medical examination of any child under sixteen years, already admitted to an industrial establishment. They have the power to require the dismissal of a child from the establishment upon advice from the physician.

Little can be said as to the nature of the work upon which children may be employed. Present legislation contains two sorts of prohibitions. In the first place, administrative rules, that conform with the law, enumerate a certain number of dangerous employments in which minors and women may not engage. In addition, as a general rule, the law prohibits night work.¹ The second limitation deals with the duration of the work and regulates the number of hours during which children may be employed. The Law of 1892 had adopted a rather complicated system. In the case of children of less than sixteen years the actual duration of the work could not exceed ten hours out of the twenty-four; between sixteen to eighteen years the period increased to eleven hours, without being permitted to exceed, however, sixty hours per week. Finally, for girls between eighteen and twenty-one years and married women of any age, the maximum was eleven hours.

In actual practice this system did not work as well as was hoped. Difficulties immediately arose in its application. The complexity of the law was a great annoyance to conscientious employers, and permitted the less conscientious to evade easily the supervision of the inspectors. In many establishments the working day was fixed uniformly at eleven hours without regard to the ten-hour limit established in favor of the youngest class of children. The reform realized by the Law of March 30, 1900, simplified the conditions of labor by deciding that the working day for minors under eighteen

¹ The prohibition of night work applies to all women, without regard to age, but only to boys under eighteen years. Night work is held to be all work done between 9 P.M. and 5 A.M. The law allows large indulgences in respect of night work to certain classes of industries (Decree, July 15, 1893). One of the most grievous of these exceptions was that called "*de la veillée*" (evening work), which authorized supplementary hours of labor till 11 P.M. at certain periods of the year, the total duration of which might not exceed sixty days. This practice of "evening work", the abuses of which had often been remarked, was suppressed by the Decree of February 17, 1910; at the present time it only exists in establishments making garments for mourning.

and married women might not exceed a period of eleven hours. This has been reduced to ten and a half hours in 1902, and to ten hours in 1904. The same limitation is applicable to men working with women and minors on the same premises.¹ The children were sacrificed, for the time being; they were the price paid for an important and ample restriction to the working hours of adults.

The law not only limits the duration of the working day but is also careful to specify: first, that the work shall be broken by one or more periods of rest, the total of which may not be less than one hour, and which, in mines and factories requiring a continuous fire, shall be granted at the same time to all persons coming under its protection; second, for all workmen engaged together in the same shop, the hours for beginning and ending work, and for rest, shall come at the same time.²

(2) *Exceptions.* — The Law of 1841 was exclusively occupied with large industries, leaving the small shop free from any supervision. The Law of 1874 on the contrary had a much more general application. It reached, in principle, all establishments where children were employed industrially. Certain kinds of establishments, however, enjoyed exemption. There were the family workshop, charitable or technical institutions, and State institutions. The Law of 1892 abolished two of these exceptions, but, in a certain measure, it has allowed the first (that relating to the family workshop) to survive. By this exception is understood the workroom in which are employed only members of the family, under the authority of the father, mother, or guardian. The legislator shrank before the difficulties and the resistance that were certain to arise if any attempt were made to regulate these shops; where, nevertheless, abuses were numerous.

The law limits the scope of the exception by adding that, if in a

¹ What was intended by the expression "the same premises"? Did it refer to the same room only? Is a partition all that is necessary to make the premises different? According to the legislative interpretation, and that accepted at first by the Minister of Commerce, by "same premises" was to be understood all the localities where work is related and combined in such a way as to furnish a common product. This is the case in nearly all establishments having a mixed personnel. But the Supreme Court upheld a restrictive interpretation, permitting many manufacturers to erect a cheap partition between the different workshops, which was considered sufficient. Cassation, November 30, 1901; *Daloz*, 1902, 1, 17.

² Are these provisions also applicable to adults working on the same premises? The Supreme Court had first held so; but by later decisions, it held that the assimilation of the two cases was only from the point of view of the duration of the work, and that the rules relating to relays of work and to periods of rest did not apply to adults. Cassation, November 30, 1901; *Daloz*, 1902, 1, 17.

family workshop, the labor was accomplished with the aid of steam or mechanical power, or if the industry in question was classified among those that were dangerous or unhealthy, the inspector might prescribe certain measures of safety and hygiene.

Occupied entirely with the labor of children industrially employed, the Law of 1874 did not place any restrictions upon commercial or agricultural employment, nor did the Law of 1892 have a more extended application in this regard. After full discussion the question of agricultural labor was laid aside. The Committee report by Waddington went no further than to say that this class of work presents, from the point of view of health, much more benefit than detriment. It is obvious that it has not nearly the same danger as industrial labor. And yet we must admit that it has been possible for frequent abuses to exist. Whether by the desire of parents or of employers, the child is often engaged in the field during excessive periods or at tasks exceeding his forces. But, if it is difficult to establish an effective regulation over shops where all the hands work together, how may supervision be effected with the dispersion and extreme variety of agricultural labor? Above all, it was necessary to anticipate the opposition that would have been aroused. Obligatory education until the age of thirteen had already met with strong resistance and had constituted a first corrective. We ought almost to be satisfied if, for the time being, the application of the law creating this obligation could be enforced.

Briefly, then, the present system protects women and children, though still inadequately; the regulation of the labor of adults preserves its exceptional character.

§ 13. Other Reforms ; Employment of Women ; Sunday Rest.—Many reforms remain to be realized, and many of those attempted are yet incomplete or only partly effective.

In the first place, legal protection is not fully accorded to commercial employées. The Law of July 13, 1906, establishing a weekly day of rest, is one of the first measures of labor regulation applicable to commercial houses. In the second place, certain foreign laws prohibit work by women for a certain period after child-birth. The French Law of November 27, 1909, does no more than declare that the suspension of the work of the mother during the eight consecutive weeks preceeding and following accouchement cannot be a cause of dismissal by the employer under the terms of the contract of her service, on penalty of damages recoverable by her.

Thirdly, the principle of a weekly day of rest is to-day established

in all salaried employments. The law first enjoined it in favor of married women, and of children under eighteen years of age, and was content to provide that the employer might not employ persons coming under the law more than six days a week, leaving to the parties themselves the fixing of the day of rest. This was to neglect the main purpose of the reform. In fact, the prohibition of work on Sunday is not merely a hygienic and humanitarian measure, but, for the family, disorganized by industrial labor, it is a means of rediscovery, of reunion every week. To offer members of such a family different days of rest, is to deny them the possibility of reunion, and lead them to seek all their distraction outside the home. The Law of 1906, which renewed and generalized the prohibition against employment of the same employee or workmen, in any establishment, industrial or commercial, public or private, lay or ecclesiastic, for more than six days a week, establishes the principle that the period of rest must fall simultaneously and on Sunday. But the rule contains very many exceptions, which have considerably reduced the scope of its application. The result, we believe, might have been different, if, in place of limiting the duration of work of employees, the law had simply prescribed the closing of stores on Sunday.

§ 14. **Industrial Employment of Women in the Home.** — Should we encourage the industrial employment of the married woman in the home? The question is a troublesome one. On first thought, work done in the home would seem the best form, leaving the greatest initiative and independence, and assuring a dignity to life. The wife remains in the house; she does not abandon her natural duties and yet contributes to her family's resources. As a matter of fact, work performed in the home is often the worst, the most unhealthy of all forms. The worker passes her life in a small room, badly ventilated, often unheated, where the dust and refuse of the work renders the atmosphere still less breathable. There is even danger to the purchaser from the products of such labor. Certain contagious diseases, such as scarlet fever, diphtheria, and tuberculosis, are transmissible to those who wear clothes manufactured in such contaminating surroundings. And finally, it is the poorest paid form of work. The investigation in England in 1895 showed infinitesimal wages; for a dozen buttonholes, 35 centimes; for a shirt, 50 centimes, for 25 bags, 75 centimes. For an unbroken period of eight hours, from eleven o'clock in the morning, the women earned at a maximum 7.50 to 9 francs a week. In Germany, women working at home earn 8 francs by laboring incessantly.

santly fifteen to eighteen hours a day. For home spinning the wages for the whole family reach 10 francs a week. In Italy, weavers of straw hats make 4 to 5 cents a day for twelve to sixteen hours of labor. An investigation in Silesia revealed the fact that parents made their children get up early and work until school hours, returning them to their task after school until nine o'clock in the evening. "The average of forty-eight trades studied showed an annual wage of exactly 389 francs, 79 centimes."¹ With rare exceptions, therefore, the home industry does not return a living wage.

Have remedies for these abuses been suggested? Those engaged in the study of the feminist problem have voiced but an uncertain and divided opinion.

There almost seems accord in recognizing that, in spite of its great mischief, it is fruitless to dream of prohibiting work in the home. It is a last resource in a desperate situation; it provides a crust for the miserable; it staves off death rather than enables men to live. The Congress of Women's Work and Institutions does not believe that State protection can be counted upon. It regards it as impossible and impracticable. How can people be hindered from laboring in their homes? By what means can all these homes be entered and a useful supervision over them be exercised? The great need is to combat the causes that make the work done in the home inferior in earning value, a sacrifice. The competition of hand against machine labor must be abandoned; a system of work in the home must no longer be retained as part of an industrial régime that is outworn and vanished; stockings for example, and linen goods, must not be made by hand when the machine can make them faster and better and cheaper. Effort must be directed to introduce the machine into the workingman's home through the transmission of electric motive force; or better yet, we should strive to interest these workers in tasks demanding taste, intelligence, special aptitude, work which often gains nothing by being done in common with other laborers. The sweating system must be fought by the association of forces against it, by consumers' leagues, the elimination of middlemen, agreements among workshops and orphan asylums not to accept work at prices below market value.

Many other persons incline to the belief that these remedies are illusory or at least insufficient. The State is not in reality as powerless as supposed. The International Congress for the Legal

¹ *Cotelle*, "Le sweating system", p. 6.

Protection of Workingmen holds as effective such measures as: 1. Prohibition against child labor in the home; 2. suppression of antiquated industrial methods (hand-weaving and spinning), by prohibiting the employment of new apprentices; 3. efforts to supervise home industry.¹ Many industrial inspectors believe such a supervision possible, especially when the work involves the use of machinery or motive power.

We should insist upon the introduction of all these means of improvement. They involve in reality nothing that is inconsistent, and may be employed simultaneously. If they do not succeed in putting an end to the evil, they may at least mitigate it.

V. FORMALITIES OF MARRIAGE

§ 15. **Exaggerated Formalism of the Code.** — The changes that have taken place in the condition and status of the family have given to the law governing the forms of marriage an antiquated and singularly baneful character. This legislation was intended for a society that was stable, immobile, respectful of family influences. The Civil Code imposed numerous conditions as to capacity, parental consent, and publicity. It requires the affianced parties to furnish the register of civil status with the papers necessary to prove the existence of all these conditions. The age and sex of the parties are established by their birth certificates. The consent of the parents, if they are not present at the ceremony, is given in a notarial declaration or received by the register of civil status. If they are dead, the fact is proved by a certificate of the register of civil status; where several publications are necessary, the register of civil status must be furnished with a certificate in proof of the publication, and that no objection has been entered, or that any existing opposition has been removed. When we remember all the long and costly steps necessitated by these formalities, the many papers that the parties are obliged to furnish; when we add to this embarrassment the ignorance of the parties or the inconsiderateness of the administrative agents to whom they have to apply; when, finally, we reflect that the documents and formalities re-

¹ The idea of setting a minimum wage for work in the home, which a few years ago was considered impossible of realization, appears more and more as a necessary reform, which should at least be tried. The various investigations, discussions, and studies made of this subject have broken down resistance and dissipated certain prejudices. The draft of a law, proposed by the Government November 7, 1911, charges the "conseil de prud'hommes" with the fixing of a minimum wage for the different classes of industries carried on at the domicile.

quired by the civil marriage cannot suffice also for the religious marriage, — we realize the truth of the oft-repeated saying that, for the poor, marriage is an extravagance, in time and money. These conditions explain the increase in the number of irregular households in the large cities; many persons, chiefly in the working districts, hesitate before the multiple formalities. The parties live together, both intending to regularize later a situation accepted for the moment. But years elapse, and the situation remains unchanged. A quarrel arises, the man finds new attractions, or feels that the burden of caring for his children is too heavy. The parties recall that they are not bound to each other by any legal obligation. They separate, without solicitude for the children.

These sad consequences of requiring excessive formality have often been adverted to. Several organizations have been formed aiming to remedy it in a certain measure.¹ These societies offer to undertake all the necessary steps on behalf of the interested parties. They place themselves at their disposal, or voluntarily offer their services, visiting the homes of persons living notoriously in irregular relationship, pointing out the dangers of their situation to themselves and their children, proposing to procure for them all the papers and pay all the expenses necessary to legalize their union. Under these conditions the parties have only to present themselves on the appointed day before the register of civil status. But such work must be limited in results. Legal reforms have often and long been demanded.

A law of December 10, 1850, accomplished the first improvement. It provided that:

1. The papers necessary for the marriage of the impecunious, for the legitimation of natural children, and for the return of children left in asylums, shall be demanded and prepared by the register of civil status of the municipality in which the parties shall have declared that they desire to be married. Such necessary papers shall be exempt from stamp tax and recording fee; judgments or judicial actions shall be prosecuted by the public prosecutor upon his own motion and without cost.

2. Persons are impecunious and entitled to the benefit of this law who can furnish a certificate of poverty, delivered to them by the commissary of police, or by the mayor in municipalities where no commissary of police exists, showing by the tax record that the

¹ Saint-François-Régis (1826); Saint-Vincent de Paul; "L'Œuvre évangélique des papiers de mariage; La Société du mariage civil de Paris et du département de la Seine."

interested parties pay taxes of less than 10 francs, and signed by the justice of the peace.

§ 16. **Legislative Reforms.** — Experience proved these measures insufficient, since the evil desired to be remedied increased rather than diminished. The necessity for greater simplification was generally admitted. The proposals made with this object led up to the law of June 20, 1896, and of June 21, 1907, modifying several articles of the Civil Code with a view to facilitating marriage. This was effected by the suppression of certain conditions hitherto required and by the simplification or the waiving of certain formalities.

The Civil Code gave great attention to the rights of the family in the matter of controlling the marriage of the child. It provided that, until the age of twenty-five in the case of men and twenty-one of women, the possibility of marriage remained subject to the parents' consent. Without their consent the marriage might not be celebrated, or if celebrated, its annulment could be demanded by the parents whose rights had been ignored, or by a child who had not obtained their consent. After the age of twenty-five or twenty-one, as the case may be, the consent of the parents was no longer indispensable, but their advice had to be asked. Article 151 of the Code, reproducing in part the terms of the Edict of 1556, required that the consent be asked by a formal petition. The petition, which was presented to the parents by a notary, contained notice of the child's intentions. It had to be presented three times, month by month, by daughters between twenty-one and twenty-five years of age, and by sons between twenty-five and thirty. The marriage could not be celebrated until after the expiration of one month from the date of the last notice.

These rules were first of all simplified by the Law of 1896, which in every case reduced the formal petition to the parents to a single notice. Since the usefulness of this formality was already doubtful, the necessity of renewing it several times was more so. The Law of June 21, 1907, advanced another step. When the child reached the age of twenty-one, the law no longer required the parents' consent in any case. At the same time it abolished the formal petition to the parents, replacing it, however, by a new procedure. Unless over thirty years of age the parties must cause notice of their intention to marry to be sent by a notary to their mothers and fathers, and after such notification wait a period of thirty days before celebrating their marriage.

To simplify the proof of the death or absence of parents, a De-

cree of the Council of State of 4 Thermidor of the year XIII (1806), had authorized the register of civil status to allow the marriage of persons of age upon a simple declaration under oath, confirmed by the statement of witnesses, that the place of death or of last domicile was unknown. The Law of 1896 changed the option of the register of civil status to celebrate marriage to an obligation on his part to do so. At the same time a parent, sent to exile in a colony or held in prison on discharge from a term served at hard labor, was regarded as under disability to manifest his will; the child need obtain no consent from him. In case of disagreement between parents who are divorced or separated from bed and board, it is sufficient if consent is obtained from the party securing the separation or the divorce and who has the care of the child.

§ 17. **Criticism of the Reforms.** — These reforms have not been without effect. They have, at least for the time being, brought about an increase in the number of marriages. Nevertheless, the formalities exacted still remain too burdensome, slow, and complicated for many persons. A few observations will make this evident.

1. Marriage is gratuitous for the impecunious alone, and they must claim and prove themselves to be such. To obtain a poor-certificate, numerous steps are necessary. The certificate is given by the mayor or the commissary of police only upon production of a certified copy of the tax records given by the receiver of taxes. If there are several tax-receivers in the town where the party lives, each must be visited successively. This is not all. The signature and approval of the justice of the peace are required. It was proposed, but unsuccessfully, to do away with this requirement. The circular of instructions of the Minister of Justice merely declares that, to avoid these many steps and consequent loss of time to the parties, the mayor shall send the certificate by post to the justice of the peace, who, after having signed in the proper case, shall return the papers by the same means. This double operation will not always be very rapid; it will not necessarily avoid inconvenience to the interested parties. The same circular of instructions recommends to the justices of the peace that they perform with the greatest care the duty of supervision confided to them. It may appear necessary to them, in order to inform themselves, to summon the parties and hear testimony.

2. The law declares that, in the case of the marriage of impecunious persons, the necessary papers shall be sought and procured by the register of civil status of the municipality in which the parties

have declared their desire to be married. The parties are in reality dependent upon the diligence and good will of this officer. If he is unobliging, ill-informed, or unfamiliar with the legal requirements, the parties will wait a long time and will make frequent journeys to his office. If a difficulty arises with regard to some necessary paper, it is not to be hoped that he will undertake steps to overcome the obstacle and avoid the embarrassment.

3. A great complication arose from the difficulty of procuring a death certificate or proof of absence of the parents. The Laws of 1896 and 1907 oblige the register of civil status as the general rule to be content in such case with the sworn statement of the parties. The circular of instructions from the Minister made an exception, however, in the case where it appeared to the register of civil status that the parties were not honest. Furthermore, the text of the law is that the marriage of persons *of age* shall be permitted under these conditions. From this it has been concluded that the law is not applicable where one of the affianced parties has not attained twenty-one years. Such a party is not excused from furnishing the death certificate.

4. The papers required are still very numerous and sometimes very costly or difficult to get together. Before the marriage can take place, a birth certificate must be shown, issued not more than three months prior if in France, and six months if in a colony or consulate.¹ Persons who have an old copy of their birth record may not use it, and if for any reason their marriage is delayed, the papers which they have collected may be invalid; a new birth certificate may be necessary.

Where a birth certificate cannot be procured, a declaration of the fact of the birth must be drawn up by the justice of the peace upon the evidence of seven witnesses. This declaration of birth must then be presented to the court and confirmed by it. Where the parents are divorced or separated from bed and board, if the child produces merely the consent of the party who was awarded the divorce and the child, it must be shown that the advice of the other parent was sought, and a certified copy must be furnished of the judgment of separation and proof of the recording of the judgment upon the register of civil status. When the necessary birth or death certificate has been issued in the municipality where the marriage is to take place, the registers of civil status sometimes require the production of certified copies of these entries, although they have them at their elbow and need do no more than state, in

¹ Law of August 17, 1897.

the body of the marriage certificate, that they have verified by examination of the records the births and deaths required to be proved. In fact, the registers of civil status, or rather the clerks of the mayor's office, through ignorance, excess of precaution, or fear of involving their responsibility, multiply the requirements and go beyond every limit of law or reason. We may cite as an example the case of a certain young girl, the history of whose case was gathered by a charitable institution. Resident in a municipality where she desired to marry, she was asked to prove the death of her parents. The name of the father, who had died in the hospital of Montpellier, was incorrectly given in the record. The mayor required its correction, and that could be obtained only by a judicial proceeding. The judgment was secured, and a certificate of the corrected record was addressed to the mayor. The name of the father was correctly given, but he was described as single. The mayor consulted with the justice of the peace, and upon his advice demanded a second judgment in correction of the record. The intervention of two public prosecutors, one of the place of birth, and the other of the domicile, was necessary to terminate the affair, and induce the mayor to celebrate the marriage. Left to themselves, without such obliging assistance, the parties might never have been able to surmount all these difficulties.¹

§ 18. **Foreign Legislation.** — The reforms so far effected in France seem incomplete. Neighboring legislations furnish us, however, with examples of simpler and more reasonable regulations. We would mention especially those contained in the German and the Swiss Civil Codes.

In Germany and Switzerland, the family is required to play a part only in case of the marriage of minors. Majority is fixed in Germany at twenty-one and in Switzerland at twenty. If the

¹ There remain the delays and difficulties to which the right of opposing the marriage may give rise. By the terms of Article 173 of the Civil Code, the father, and in default of the father, the mother, and the grandparents, may oppose the marriage of their children and descendants, although these may be more than twenty-one years old. The opposition may be validly made up to the moment of celebrating the marriage; the parents or grandparents are not obliged to give a motive for their opposition, and the decree denying the opposition can impose no damages upon the parent who has set up the opposition without justification. It would be possible, in fact, to cite cases where oppositions, though judged ill-founded, have been renewed; the register of civil status, rightly or wrongly, to evade responsibility, has thought it his duty to delay. In this way marriages have been delayed for months. We have had our attention drawn to one case in which, by multiplying such legal actions, the celebration of a marriage was successfully prevented for eighteen months.

father and mother are dead or do not enjoy parental authority, the consent of the guardian alone is asked, and the right of appeal is given if this consent is withheld.¹ In France, minority is in a sense prolonged until thirty years, because of the necessity of proving the consent of the father and mother, or of showing that they have at least been notified of the intention to marry. When the formal petition was replaced by mere notice, it was preserved under a different name. Its entire suppression, which the Chamber of Deputies had accepted, but to which the Senate would not agree, was, nevertheless, the only way of cutting short the difficulties incident to proving the consent, absence, or death of parents. Doubtless, in a matter of this sort, the legislator must guard against a two-fold danger. The abuse of family influences may be fatal to marriage. We cannot be forgetful of the evil caused by this abuse among the nobility and upper classes at the close of the Old Régime. Excessive individualism on the other hand is another danger. The child who marries without regard to the preferences of his parents by such very act tends to become a stranger to them. The new grouping breaks the tie which bound the child to the old. This consideration may be offset by recognizing, as a compensation for the liberty of marriage, the rights of the parents to disinherit the child who marries against their will.

The Swiss Civil Code has devised a very simple manner of publishing and celebrating marriage.² The parties need only make a written declaration of their promise to marry before the register of civil status of the man's domicile. They submit their birth certificates to this officer, and if minors, the written consent of their father, mother, or guardian. The register of civil status then provides or directs provision for publication, in accordance with the regulations of the cantonal law. Direct communication between the clerks of the offices of civil status renders the intervention or effort of the parties needless. The officer receiving the promise of marriage issues a certificate of publication after determining that there has been no opposition. This certificate authorizes the couple to be married within the next six months by any Swiss register of civil status. The German Civil Code, somewhat less liberal, only confers jurisdiction to marry³ upon the officer of the locality where one of the parties has his residence or domicile, but permits⁴ the granting of a written authorization by virtue of which the marriage may be celebrated before other registers of civil status.

¹ German Civil Code, Art. 1304.

² Arts. 105-119.

³ Art. 1320.

⁴ Art. 1321.

VI. SOCIAL VALUE OF MARRIAGE

§ 19. **Disapproval of the Institution of Marriage.**—The anarchistic school, and a whole wing of the socialistic school, consider marriage reform a deception; for they go so far as to hold the institution itself as evil in its results and condemn it absolutely.

It is not easy to systematize these objections or criticisms, which are ordinarily very violent and are presented under the most varied forms: in the novel, the theatre, or studies in social economy. Marriage is denounced as immoral and anti-social. In essence it should be an association founded upon love, confidence, and mutual respect; in reality it becomes, especially in the well-to-do classes, a sort of sale, "do ut des." The husband seeks the marriage portion, the bride or her parents set value upon worldly position. The outward respect manifested on marriage is mere conventional sham. "Every marriage entered into between man and women in view of a material position or other selfish advantage," says Max Nordau, "is prostitution. It is of no importance whether such an alliance has been celebrated by the register of civil status of the State, or by a priest, or any first comer."¹ The laboring class partly escapes the influence of these selfish motives. For them marriage is more disinterested, though no more moral. The husband believes that his wife belongs to him, that he has a right over her. He has not a fine enough nature to realize that his right is of another sort than that which he exercises over chattels. "And where will this man, ignorant, abused by destiny, embittered by a hand-to-mouth struggle for existence, himself a victim in the world of wage earners of the oppression and iniquities of others, — where will he learn to respect human personality? The law delivers over to his life-keeping a being, frailer than he, owing obedience, entirely dependent upon him when their children arrive. We need feel no surprise if, this situation lending itself to abuse, he does abuse it and revenges his own sufferings in tortuous ways, choosing as his victim his wife, over whom law and custom placed him as master without ever interfering to recall him to his duties."² Selfishness, cupidity, grossness, tyranny of the poor, each class has its vices.

Marriage, it is claimed, is not only immoral, it is injurious. Postponed by reason of the difficulty of making a position, it causes

¹ *Max Nordau*, "Les mensonges conventionnels" (French trans. by *Dietrich*), p. 273.

² *Benoît Malon*, "Le socialisme intégral", Vol. I, p. 344.

the incontinence of a certain proportion of youth, and brings in its train seduction and prostitution. Marriage is difficult, almost impossible, for the girls of the middle class, well brought up, but without fortune. It denies a family to those who are perhaps most fitted to assume family duties, the noblest and the most devoted. The idea of proprietorship, of subjection, at the basis of this conception of marriage, is a cause of grief and waywardness. It causes a condition of sex-war, a state of violence which, writes Malon,¹ "because of the degrading unfitness of juries, the complicity of a conscienceless press, without vision or principles, is becoming a common, glorified, encouraged, universalized practice of assassination in its lowest form, because of jealousy." Lastly, marriage leads to the most shocking inequality. The law, which aims to make it the basis of the family, condemns the children born from an irregular union to a place of inferiority, though without responsibility for the fault of their parents; and their legal inferiority is aggravated yet more by custom. Thus Bebel concludes: "The wealthy classes are neither able to give a satisfactory form to marriage nor provide satisfactorily for those who do not marry." Worst of all, among the poor marriage is no protection to woman. The obligations of the husband do not carry sufficient penalty; performance of the engagements entered into is never assured.

§ 20. **Refutation of these Views.** — There is great exaggeration in these accusations, though no doubt also a certain amount of truth. Marriage is often degraded by immorality, or dishonored by covetousness and regard for money. It nevertheless still remains, as Letourneau recognized, the surest and the sole protection of the child. Statistics show that the child born of an irregular union is infinitely more exposed to crime, sickness, and death. The figures gathered by the "Institut International de Statistique"² showed that the number of still-born among illegitimate children in France is almost double that among legitimate children. If we suppose the number of legitimate still-born to be a hundred, the number of the illegitimate still-born is in France a hundred and eighty-nine. The irregular union sacrifices the child. If the parents think only of themselves and assume no obligation as to the future, the child will always be sacrificed. And the woman no less so. All that tends to render the union of the sexes temporary and unstable militates against the woman.

¹ *Benoit Malon, op. cit.*, Vol. I, p. 349.

² Cited by Pouzol in "La recherche de la paternité", pp. 384-385.

She is abandoned when she no longer pleases, when youth is over, when she has been worn by cares, sufferings, and the pains of motherhood.

The least reproach that can be aimed against irregular unions, said Pouzol,¹ is that it is open to the same attack as marriage. In the first place, the "union libre" is in no sense a guarantee of happiness. It has its victims like marriage. While marriage is founded sometimes upon base motives, the search after pleasure, the satisfaction of the passions, belong to no loftier standards. Every day the newspapers contain accounts of dramas of jealousy and fickleness in these irregular families. It is difficult to say whether they are more or less numerous than in marriage. Are not such unions, when they endure any length of time, denounced by the advanced radicals as a form of marriage? "I would observe," wrote Sebastien Faure,² "that, in my belief, the same disadvantages result from unlawful unions and irregular establishments. Such unions are in reality true marriages lacking civil and religious sanction."

It is obviously in the interest of society that the relation of the sexes be not abandoned to the caprice of individual liberty, that the State insist upon, and set penalties to, the obligations at the inception of the union, and that it concern itself with the welfare of women and children. We favor indeed a penalty yet more severe; we would ask if it would not be desirable to make abandonment of the family a crime.

We do not think, however, that it is necessary to push the rigor of our principles to the point of ignoring and disregarding reality. The truth is that the majority of such unlawful unions are formed in the cities. In certain quarters of Paris they form more than half the households. When they are permitted and endure over a period, they should be given consequences. It is proper that certain results should attach to their status favoring the child and even the women; it is proper to permit that the continuance of the relationship should involve responsibility, independent of any question of seduction or promise of marriage. In these days, when the provisions of the workmen's insurance laws commence to apply, it is highly important to bring the irregular households within the terms of the insurance. Certain mutual insurance companies have already made significant concessions by according the same aid to the man's companion as to the wife. The Law

¹ Cited by Pouzol in "La recherche de la paternité", p. 421.

² "La douleur universelle", p. 346, note 1.

of April 9, 1898, upon industrial accidents, grants twenty per cent of the wage in the case of the death of the workman to the widow in case only she is not divorced or legally separated, and on the condition that the marriage was contracted prior to the accident. As to the proportion granted the children, the law makes no distinction between legitimate and illegitimate descendants. A more liberal and humane rule would seem desirable. The rule ought to be that, on condition that the situation be declared when the insurance commences, the workman may be allowed to stipulate that the benefit shall be payable to the woman with whom he is living in an unlawful relationship.¹

VII. MARRIED WOMEN'S STATUS

§ 21. **Parental and Marital Authority.** — We may, in a general manner, describe thus the position in which our law places the woman as such: She participates in no way whatsoever in political life, but within the domain of private law the two sexes are placed upon a footing of complete equality. The civil law no longer recognizes any privileges due to masculinity. Woman enjoys as a general rule the same advantages as man. Her legal capacity is the same. We can think of scarcely an exception apart from the matter of guardianship; from Article 442 of the Civil Code it follows that women other than mothers and female grandparents cannot be guardians or members of the "family council."²

But the equality accorded to women ceases with her marriage. Made subject to her husband's authority, she is affected by an

¹ It seems possible to observe two movements working oppositely. On the one hand, the tendency is to regulate the irregular union; on the other, by facilitating and widening the causes of divorce, the social value of marriage is decreased. There results at once a gain and a loss, and between them a sort of balance may be established.

² This exclusion is explained by the influence of an old notion, according to which guardianship is a public charge. It is by reason of this idea that persons who have been deprived of their political rights, women and foreigners, are not permitted to exercise this function. The conception seems to us quite antiquated. Since 1875, the Court of Cassation has allowed the foreigner to become guardian in France of his French children. Cf. Cassation, February 16, 1875; *Sirey*, 1875, I, 193.

In so far as applicable to women, this incapacity is both unjust and regrettable; it can never be explained why an aunt or older sister, who, in the particular case, may be perhaps the only protectors of the child, the only persons capable of loving it, can neither act as guardian nor as members of the family council, and that we are driven to an appeal for assistance from strangers or persons who are indifferent. The Law of July 2, 1907, abolishes this exclusion as to the guardianship of illegitimate children; there is no reason for maintaining it when the guardianship of legitimate children is in question.

incapacity embracing all her jural acts. She can perform none without the authorization of her husband or a court. We must examine her situation from two points of view. It is, in fact, possible to distinguish matters relating to the husband's authority, the rights and obligations of both, from those relating to their property.

It is difficult to say in what measure the Civil Code accepted and established the principle of marital authority. It belongs rather to the past. It is certain, however, that there was no desire to reject it. Article 1388 mentions it expressly and prohibits any derogation by the terms of the marriage contract. Article 213 declares that the husband owes protection to the wife, the wife obedience to the husband.

Legal historians, notably Paul Viollet,¹ have shown in a striking manner the correspondence between the history of marital and of parental authority. In the beginning they both constituted rights without limitations. The father and husband was absolute master over the person of his child and his wife. His authority, regulated solely by custom, was free from all legal control. It conferred the right of life, death, sale, correction, and incorporation.

§ 22. **History of the Limitations Imposed.**—Progress has operated in two ways:

1. The exercise of the right was conditioned upon the existence of a legitimate ground. This doctrine is what is called to-day the theory of the "misuse" ("abus") of rights. We have endeavored to show elsewhere,² that this doctrine had very early origins, that it was encountered in every legislation, and that in the Roman law it explains the development of a large number of institutions. The "actio Pauliana" was a restraint placed upon the exercise of certain rights. The protection of the slave against the master, and of the child against the father, tended to repress the abusive exercise of rights. Recourse was had to the same method when it was a question involving the wife. It was not permissible, according to an old law of the Lombards, that a husband should kill his wife when he pleased, but only for a reasonable cause.³ Viollet believes that even in the 1000s A.D. the husband used to exercise his right to kill his wife, when he had a good reason.⁴ Beaumanoir contains the same idea with regard to bodily correction: "A husband may beat his wife when she refuses to obey his commands

¹ "Précis de l'histoire du droit français", p. 416, etc.

² "Revue trimestrielle de droit civil", Vol. I, p. 119; "Le droit et l'esprit démocratique", p. 88.

³ Edict of *Rotharis*, chap. 200.

⁴ "Précis de l'histoire du droit français", p. 419.

or when she denounces him or lies to him, provided that he does so moderately and that death does not ensue.”¹ Gradually the act came to be condemned aside from its motives, and to be considered no longer within the sphere of the husband’s rights. Thus to-day marital authority no longer includes the right of bodily correction. But this right, which is refused to husbands, may be exercised, according to certain authors, by the father upon the son. The day is not perhaps far distant when the two cases will be assimilated. The suppression of the abuses will have led to the limitation or abolition of the right.

2. Another means may be employed without suppressing the husband’s right of correction. He may no longer be allowed to exercise it directly. Its application may be entrusted to a public authority, which would act vigorously upon motion of the husband. Thus, in our early law the husband had the power to shut his adulterous wife in a convent. Some jurists required the consent of the nearest relatives of the wife. The husband could also apply to the courts and show cause for obtaining an order of imprisonment. Among the noble class, a detention that was sometimes for life resulted from “lettres de cachet.” A trace of this manner of exercising the right of correction is found in the provisions of the Penal Code, relative to the punishment of adultery. In the first place, the punishment is severer for the wife than for the husband. The adultery of the wife is always a crime whenever committed. She is punished by imprisonment, whereas a mere fine is provided against the husband who has been guilty of adultery in his home. Lastly, whereas the husband who kills his wife caught in adultery enjoys a defense in extenuation, no text of the law excuses the murder of the husband by the wife under like circumstances. The adultery of the wife may be prosecuted only by the husband; he has the power to stay the effect of a condemnation by consenting to take back his wife. It seems likely that, in this invocation of the public authority and in this right of condonation, there are traces of the power of correction.²

At the end of the Old Régime, the marital power consisted of little more than a preponderance of authority in the husband, considered legally as head of the family. It was regulated by custom rather than law. Pothier defined it as the right of a husband to require from his wife all the duties of obedience which are due to a superior.³

¹ “Coutume de Beauvoisis”, 57, 6.

² *Paul Viollet*, “Précis de l’histoire du droit français”, p. 424

³ *Puissance du mari*, no. 1.

§ 23. **Early and Revolutionary Law.** — Viollet has shown that the early law, at a certain period in its history, augured a brighter legal future for the wife.¹ In the Middle Ages we see the woman associated in the affairs and interests of her husband, taking a real part in the feudal régime, sharing in the sovereignty that attached to the ownership of the fief, as when, for example, even in the vassal class, she took part in certain elections. In the provinces of written law she met with no civil disability. We may accept these as so many favorable prognostications that have failed.

Another fact may be surprising. The French Revolution, the object of which was to liberate mankind, showed itself distrustful, even hostile, to feminine claims. A few isolated voices were raised in their favor; but in general, they were treated rather as enemies. They were regarded as a retrograde element, attached to the prejudices of the Old Régime as well as to religious traditions. When Charlier demanded that women enjoy the right of association, Bazier replied: "We propose for the time to throw a veil over abstract principles, for fear of the use to which they might be put in encouraging a counter-revolution. It is, therefore, solely a question of determining whether meetings of women are dangerous. Experience has proven, these recent days, how perilous they are to public tranquillity. This admitted, *let me hear no more about principles*. I demand that, exceptionally, and as a matter of public safety, associations of women be prohibited, at least during the revolution."²

§ 24. **Napoleon's Hostility.** — They met yet another adversary in Napoleon I, who was no lover, or, more properly, no respecter of women. He proposed to prohibit all social and political activity by them. Their function was to be limited to bringing children into the world and to caring for the home. During the period of the preparation of the Code, he insisted upon the insertion of the principle of obedience to the husband, and required that she be reminded formally of this duty at the moment of the marriage celebration. "The word 'obedience' is especially suited to Paris, where women believe they have the right to do what they please. May it not be well to add that the wife shall not receive persons displeasing to her husband?"³ The draft of the Code limited the duty of the wife to follow her husband; but these

¹ "Précis de l'histoire du droit français", p. 248.

² Cited by *Mme. Maria Cheliga*, "Le mouvement féministe en France", in "Revue politique et parlementaire" (Aug. 1897), p. 274.

³ *Thibaudeau*, "Mémoires sur le Consulat", p. 426.

limitations were suppressed upon the opinion of the First Consul, who insisted that the principle of obedience be accepted absolutely.

§ 25. **Wife's Civil Incapacity.** — It is difficult to characterize the state of dependence created by marriage. We may observe at least that the woman, on marriage, abdicates or compromises her capacity, her nationality, her name, her liberty, and her life. Over her children she has not the same rights as her husband.

There is no doubt but that the civil incapacity of the married woman was considered in our early law as a consequence of the husband's power. "The necessity of the husband's authorization," said Pothier,¹ "is founded solely upon the power which the husband has over the person of his wife, which allows the wife to do nothing save with his consent." From this flowed logically a certain number of consequences, for the most part recognized by our early law. Nevertheless, we find in the Civil Code a whole series of applications not in accordance with this principle. For example :

1. Invalidity of her acts, for want of authorization, may be pleaded not only by the husband, but also by the wife. The husband alone should be permitted to benefit by it, if the incapacity was merely a penalty attaching to his authority.

2. When the husband is insane, a minor, or absent, the wife's incapacity has no reason to exist. Nevertheless, the Code tells us that in such case the authority of the husband shall be replaced by that of the court.

3. If her disability is a penalty attaching to the husband's authority, it should be possible for authorization to be general, and a ratification after the act should be held sufficient. But it is not so. Authorization must be specific and given at the moment of the performance of the act. Ratification by the husband does not deprive the wife of her right to demand the annulment of his act.

How are we to explain these rules unless the purpose of incapacity is to protect the wife, just as guardianship is to protect the minor?

On the other hand, if the authorization is established in the interests of his wife, if the law fears for her inexperience, her fickleness, it becomes difficult indeed to explain a mass of provisions, implying the contrary idea, that the law recognizes in women a complete aptitude for all acts of civil life. Since the legislator regards woman as incapable, why does he not assure her protection before as well as after marriage? How are we to explain that she

¹ "Puissance du mari", no. 3.

may be guardian of her children or of her insane husband, or that she may, by an authorization, become a trader? And above all, how are we to understand the legislator's abandonment of her to herself at the moment when, if true that she is actually incapable, she has particular need of protection; as for example, when she contracts with her husband, or makes him a gift, or goes surety for him? In such case the husband may be called to give legal capacity to his wife in his own interests and against her own. Were the incapacity created in benefit of the wife, the law would not contain such provisions. The law, indeed, protects all who lack capacity, notably minors, as against those charged with the management of their property, whenever the interests of the guardian and ward conflict.

We may then suppose that the incapacity of the married woman is not explainable exclusively upon either of these two bases, protection of the wife or dependence. Both inspired the legislator, without its being possible to determine which of the two influences predominated. The consequence has been such contradictions as we have just pointed out. All that may be said is that the preparatory drafting of the Code proves that the legislator gave weight to all these motives, and that the incapacity of the wife was regulated in her own interest, in that of the husband, and in the common interest of the family. "The system," as Beudant recognizes, "is hard to defend, since it is neither precise in principle nor well regulated in application."

An important derogation was made by the Law of February 6, 1893, which completely abolished the incapacity of the woman separated from bed and board. No reason is apparent for not conferring a like capacity upon all women separated with respect to their estates by judicial process or by agreement. Other derogations upon the principle of incapacity have been introduced by special laws and these exceptions are making way for its final abandonment.

In Italy, incapacity, though still broad, is the exception. It does not exist outside the cases covered by Article 134 of the Code. In England women have been freed from all civil incapacity by the Acts of 1870 and 1882. The incapacity of the married woman does not exist under the German Code; the wife may freely bind herself, or contract, subject to two exceptions: 1. Her acts can not prejudice those of her husband's rights that grow out of their matrimonial system; 2. the husband may, with the consent of the Guardianship Court, cancel his wife's contracts by which she binds

herself to the performance of acts which appear contrary to their common interest.¹ We meet almost the same system in the Swiss Civil Code; the general rule is again that of capacity of the married woman. "It is not apparent," said the author of the Code,² "why a woman should be placed under guardianship by the fact of her marriage, when she previously enjoyed the exercise of her civil rights. Her marriage has not taken from her either her intelligence or more particularly her experience of affairs." Article 167 admits but a single restriction, in the case of the exercise of a profession or trade. If the husband refuses his consent the wife may be authorized by the court to enter a profession or trade, if she is able to show that such action is dictated by the interests of their union or of the family.

§ 26. **Her Nationality.** — The legal principle is still maintained in France that a woman acquires the nationality of her husband by marriage.³ This has sometimes been explained by a presumption of intention. The reason is a poor one. Nothing leads us to suppose this intention; and at least the wife should be able, by a formal declaration, to avoid a change of nationality. It is in reality a survival of the law of the Old Régime, by which the individuality of the wife was absorbed into the husband's. By a sort of inconsistency a change of nationality on the husband's part is without effect upon the wife. A French woman loses her nationality by marriage with a foreigner, but does not regain it if her husband subsequently becomes French. Since 1889 she is merely allowed to obtain French nationality without waiting the preliminary period, either through the same decree conferring it upon the husband, or by a declaration made in accordance with Article 9 of the Civil Code before a justice of the peace of the canton and recorded with the Minister of Justice.⁴ The same should be true of the acquisition of nationality on marriage; the law should facilitate the wife's acquisition of her husband's nationality, but not impose it.

§ 27. **Her Name.** — It has been uninterruptedly customary to call the married woman by her husband's name. To what extent has the usage force of law? The question has long been controverted. Some authors, notably Beudant,⁵ find a genuine acqui-

¹ German Civil Code, Art. 1358.

² *Eugen Hüber*, "Exposé des motifs de l'avant-projet: droit des personnes", Vol. I, p. 95.

³ Civil Code, Arts. 12, 19.

⁴ Civil Code, Art. 12, modified by Law of June 26, 1889.

⁵ "Droit civil: état des personnes", Vol. I, p. 420.

tion based upon customary law. Most authors contest the authority of custom. The Law of February 6, 1893, which forbade the divorced wife to retain her husband's name, would seem to justify the argument based upon custom. Divorce could not deprive the wife of a right to the name if she had not acquired it. Furthermore, the practice is not explained merely by reasons of convenience or manners, but implies a dependence, an inferiority, a survival of the time when the woman dropped out of her own family upon entering her husband's. The proof is that the progress of feminism is contrary to this ancient habit. A woman exercising a trade does not willingly give up on her marriage a name which has acquired a value; she does not merely add hers to her husband's; she first adopts her own and adds her husband's.¹

§ 28. **Her Loss of Liberty.** — Marriage deprives the wife of a portion of her independence. She must live with her husband, following him wherever he pleases to reside. Obedience is the price of the protection owed her. The courts have not yet universally abandoned the rule that the wife may be forcibly brought back to her husband's home, though the practice of such means has become more and more repugnant. The courts recognize also the husband's right to control his wife's social relationships and correspondence, though they interfere only to repress an abuse. For example, the courts have refused to recognize the husband's right to deprive his wife arbitrarily of all association with her near relatives. It is disputed whether the husband can force the postal authorities to deliver to him directly letters addressed to his wife. Article 807 of the General Postal Instructions authorizes delivery to the husband, but exacts an order of the court. The question does not arise in practice so long as the parties live together.

The more important problem is to determine what legal use the husband may make of letters addressed to his wife which fall into his possession. In this respect the husband and the wife are not upon an equal footing. The wife is allowed to use letters, written by her husband or addressed to him, only when they have fallen into her hands without the employment of any reprehensible means to procure them. She may for example use letters found open in a piece of furniture or in the pockets of his clothes or also letters opened with his consent. It has been held, that she may not, on the contrary, use letters intercepted in the hands of a servant having instructions to post them.

The husband's situation is quite different. Until very recently

¹ *Perreau*, "Le droit au nom en matière civile", p. 233.

he was permitted to have all letters written or received by his wife, no matter what means he employed to procure them, upon the single condition that that means did not constitute a crime. A decision of the Court of Cassation¹ has placed an important restriction upon this right. It admits in the courts the right to bar confidential letters which have come into the husband's possession by unfair or unloyal means. In the particular instance a woman, a friend of the wife, had confidentially received letters compromising the wife, and the friend had delivered them to the husband. Here, as in the question of the right of controlling her social relationships, the courts condemned the abuse of the right without disputing its existence. In giving the principles of its decision, the court said: "Though the conception of the inviolability of correspondence must give way exceptionally before the husband's right, arising out of his domestic authority, to search for proof of injury done his honor or of any serious failure in the marriage vows imputable to the wife, nevertheless this right may not be without limits."

The principle thus affirmed would seem nothing less than obvious. Admitting that the husband has a right of control over his wife, are we to conclude that this right can nullify the rule of the confidential nature of correspondence? If a matter is confided to the wife by reason of her profession, may she not maintain it secret from her husband? Is it admissible that by virtue of his authority as husband he can force his wife to reveal it to him or try to discover it by stealth, by opening her desk and ransacking her papers? Is there not identity in the two situations?²

§ 29. **Inequality of Parental Authority.**—The status of dependence and inferiority of the wife again appears in the unequal attribution of rights to the father and mother over their children. The Civil Code, by Article 372, declares that the child remains under the authority of his parents until he is of age or is emancipated. But Article 373 adds that during marriage the father alone exercises this authority. The second rule radically alters and would seem even wholly to contradict the first. We should, however, give the law credit for having recognized the mother's right, if only as an abstract principle. It was enough to justify the courts in deciding that the exercise of the parental authority by the father may not go so far as to exclude the mother completely. The father may not, for instance, separate the mother

¹ February 5, 1900, reported in *Sirey*, 1901, I, 17; note by *Naquet*.

² *Id.*, p. 18, col. 1 and note.

from her child. In the abuse of his authority the courts recognize a wrong sufficiently grave to lead to a separation from bed and board or divorce.

Furthermore, even during marriage, the parental power is not always exercised exclusively by the father. In certain important acts the Civil Code formally recognizes the mother's participation. Thus, in the consent to marry, the mother's and father's authority is associated; she must at least be consulted. For the necessary consent to an adoption, the Code goes even farther, at least in the opinion of the great majority of text-writers. It is not enough that the mother be consulted; she must herself consent to the adoption, and the desire of the father cannot prevail over her wish. We have here a real derogation from the principle contained in Article 373. Like the father, the mother has, even during the former's life, the right to accept gifts to her child, and her acceptance will be valid in spite of the father's opposition.

Such, in a general manner, is the division made by the Code, between the two parents, of the rights falling within parental authority. We do not hesitate to say that the share attributed to the mother is unjustly small. While admitting that the father, considered as the head of the family, may alone in principle have capacity to represent the child or enforce its rights, at least the right of appeal to the courts ought to be reserved to the mother. In all decisions affecting the child's future, marriage, emancipation, choice of a profession, withdrawal of parental authority, commitment to a corrective institution, it is important that the mother's reasons should, when the case arises, be given consideration.

German and Swiss Legislation. — But legislations more recent than France have not yet adopted this rule. Though the German Civil Code, by Article 1634, recognizes in the mother the right and duty of caring for the person of her child, in case of dispute it is the father's will that prevails, without possibility of appeal.¹ The right of appeal exists only when the conduct of the father constitutes a danger to the child from the point of view of his health or his morals.

Nevertheless, the German Civil Code, in this matter, seems much more favorable to the wife than the French. We have already said that under it the married woman is subjected to no disability; and it is proper to add that all the obligations arising out of marriage are reciprocal and that none is special to the husband, or

¹ Art. 1634, fin.

indicative of her subjection or dependence. We might be tempted to argue from this that the German Code recognizes the complete equality of husband and wife in marriage. Let us not, however, be deceived. Inequality appears under another heading. Article 1354 confers upon the husband the right to decide all affairs relating to their joint life. As an important instance, he determines the domicile and residence of the family. However, two correctives are admitted :

1. Whenever the husband's decision constitutes an abuse of his right, the wife need not submit ; the court decides. It is an abuse of his right for the husband to act without justifiable motives, when his decision is opposed to common usage and practice. It might be thus considered an abuse for the husband to desire to change the residence in order to make it impossible for the wife to exercise her profession.

2. One right is recognized as peculiar to the wife ; the power over the keys (" Schlüsselgewalt "). The wife, says Article 1356, has the duty and right to direct the household. Thus the law imposes upon the wife the obligation of directing the housekeeping and confers upon her the necessary powers to this end. She is, says Article 1356, bound to do the housework, when this work is customary for her in view of the station in life of the couple. But this obligation is at the same time a right, and the wife has the power to make the expenditures necessary for the family life, and she represents and binds her husband in all these charges. This representation corresponds to what we call the general and implied agency by which the wife is considered, for all the purchases necessary for their common life, as acting in the name of the husband. The German Civil Code expressly creates this agency, while with us it has been a product of text-writers and practice. The husband, it is true, may restrict this right of representation or even withdraw it from his wife ; but she may appeal to the court, if the limitation or denial constitutes a misuse of his right.

We find an institution almost similar in the new Swiss Civil Code. As in Germany, the legislator has manifested his sympathy toward women, as was said by Saleilles. His legislation attests his desire to recognize her own peculiar rights and to guarantee them fully.

VIII. MARRIED WOMEN'S PROPERTY

§ 30. **Diversity of Matrimonial Systems.**¹ — The law governing the management of a married woman's property varies according to the matrimonial system adopted by the parties. Under the systems known as community, marriage-portion, and exclusion of community, the wife's property is managed by her husband.² Under the system of separation of estates, whether by agreement or by judicial decree, the wife maintains her independence in the management of her property.

By far the most common system in France is community. In 1898, out of 82,460 marriage contracts, 68,412 provided for the community régime. Moreover, the great majority of persons marry without written contract of settlement; there is scarcely one contract to every three marriages. Now, all who marry without contract come under the system of statutory community. It is, therefore, the wife's situation under this system that we are chiefly concerned with. The question is, Whether it deserves the preference accorded it by the Code?

In appearance it would seem the most conformable to nature, — to the end itself of marriage. In reality it has serious defects. It is complicated; it brings together three categories of property and requires that certain distinctions be maintained between them; it necessitates liquidation on dissolution of marriage; and to an extent it sacrifices the wife's rights, by assuring, almost of necessity, a preponderant right in the husband.

It is notable that in Europe the community system has found its operation more and more restricted. Separation of estates is the statutory system in Russia, Italy, and England. The German Civil Code has made "administrative union"³ the statutory

¹ [By "matrimonial system or régime" is meant a particular body of legal rules governing the *property* relations of husband and wife. — TRANSL.]

² [Under "community" the husband has the management of three estates: his own personal, his wife's estate, and the estate owned in common by the two. Under the marriage portion system the wife's property is divided into two categories: that which she brings as "dot", which the husband manages and enjoys beneficially; and her separate estate or "paraphernalia", of which she retains the management and enjoyment. Under the system of exclusion of community the estates of husband and wife remain separate, the husband however managing and beneficially enjoying both. It is community with the common estate excluded. Under the régime of separation of estates each reserves both the management and enjoyment of his and her own estates. — TRANSL.]

³ [The legal or statutory matrimonial régime in Germany is governed since 1900 by Arts. 1363-1431 of the Civil Code. It is generally termed that of "administrative community" ("Verwaltungsgemeinschaft");

system of the Empire, whereas previously community was the common law rule for more than half of Germany. A like reform has just been effected in Switzerland; community was the statutory system of a dozen Cantons; but the new Code adopted by preference the system of administrative union,¹ and those who criticise this change set up as preferable to it only the system of separation of estates.

The system of separation of estates reserves to each party the title, management, and enjoyment of his or her own property. Each contributes to the common expenses and retains exclusively the profit of the economies realized. It is this system that commonly rallies the support of the feminist party, because it realizes the maximum independence of the wife. It may, however, be asked, whether by such a choice the true interests of the wife are not sacrificed to mere appearances. So long as the household prospers, it is generally the husband who earns the money. The separation of estates attributes no part of the earnings to the wife; she gains no advantage by her participation in the common life. "Why is it not seen," said Menger, "that, in the small household, carrying on a modest trade or industry, the wife works almost as hard as the husband? And, in any case, is it not by her housekeeping that the husband is enabled to give all his time to his business and to increase his profits? Is it just that from all this direct or indirect collaboration, nothing should return to the wife?"

§ 31. **Administrative Union in Germany and Switzerland.**—The system adopted as the statutory régime by the German and the Swiss Civil Codes is known under the name of "administrative union", or "community of management." These expressions, which are lacking in precise signification, lend themselves to misunderstanding. They would seem to imply the participation of both parties in the management of the property and the constitution of a common fund. The reality is quite different. The administrative union is realized in the husband, who manages both his own and his wife's estate. It suggests, as is customarily said, the French system of exclusion of community. However, each

sometimes "unity of property" ("Gütereinheit") or "union of property" ("Gütervereinigung" or "Güterverbindung"), designated in the Code as the husband's right of management and beneficial enjoyment ("Vorführung und Nutznießung des Mannes"; Art. 1363). See French official translation of the German Civil Code (Imprimerie Nationale, 1908, Vol. III, p. 115); *Schuster*, "The Principles of German Civil Law" (Oxford, 1907), pp. 499-508. — TRANSL.]

¹[Art. 178. The Code calls this the "Vorschriften der Güterverbindung." — TRANSL.]

has its peculiar features. Rather than characterize the administrative union, it will be better to endeavor to describe it.

Property rights remain distinct; each consort continues owner of what he or she possesses or may acquire. There is no estate in common; in general, it is to the husband that fall the enjoyment and management of his wife's property. His right of management does not permit him to alienate her property without her participation or to subject her property by his own debts. It seems, nevertheless, that the interests of the wife are entirely sacrificed. She does not profit by the economies which she realizes, nor has she the enjoyment of her property. But to this there are two correctives.

1. The German Code, like the Swiss Code, rejects our rule of the unalterability of the marriage agreement. Now, this statutory system has no serious disadvantage for those who, living on their earnings from day to day, employ them to defray the expenses of their life in common. It becomes unjust when, in the course of their marriage, they come into a fortune, and especially if this wealth, though made by the husband, could only have come through the help and coöperation of the wife. The parties may then substitute for the statutory system a contractual régime, — for example, a partnership of acquests, upon the sole condition that they satisfy the rules as to form and publicity required by law. There is no restriction to their liberty, except the interests of third parties, and such an interest merely requires a thorough publicity. Before extending credit to married persons, their marriage system is inquired into, just as one investigates the mortgage record of a man who asks credit.

2. Certain classes of property escape the husband's management and enjoyment. These constitute what is known as the reserve, and may arise from three sources: the terms of the marriage contract, the gift of a third party, the determination of the law. (a) The rule recognizing the terms of the marriage contract as a basis is merely an application of the principle of the liberty of matrimonial agreement. A similar freedom applies to these terms, and consequently they may be altered during the marriage, on condition that the contracting party conform to the rules as to publicity. (b) So, during marriage, a third person may make a donation to the husband or wife, stipulating that the property given or bequeathed form part of the reserve estate. (c) And lastly, by Articles 1366 and 1367, the reserve estate is composed of the objects intended exclusively for the personal use of the wife, such as her jewelry, wearing apparel, the tools of her trade, what

she has acquired by her own labor or by her independent pursuit of a trade. This is an extremely important provision, reserving to the wife the management and enjoyment of her salary and profits, and withdrawing them from the possession and control of the husband. A partial separation of estates results; the wife has the entire control of her reserve and she may treat it in the same manner as though she were not married.

§ 32. **Objections; Community Limited to Acquests.**— It remains to inquire whether such a statutory régime will not in practice raise serious complications, and often result in an injury to the wife's interests. In reality the husband and wife who have put aside savings will almost always have an account in common. How will the wife prove what part of these savings originated from her own profits? There is another complication. The profits or savings of the wife may have served to defray their common expenses; but such expenses are chargeable to the husband. Logically, he owes a restitution. But, to cut short difficulties of proof of this kind, and to avoid complicated accounts, Articles 1429 and 1430 decide that the wife who spends her property for the maintenance of the household or leaves the management to the husband, is presumed not to intend to claim compensation. Would it not have been simpler and juster (as Saleilles has remarked) to recognize in law the community which exists in fact, and to permit the partition of what has been placed in common?

But in France, the question whether it is advisable to abandon the community system is not influenced by the example of neighboring legislations. Such influence is very great in all matters relating to industry, commerce, and business in general. Other matters on the contrary cling more closely to national usage and tradition. It is so in the laws of inheritance and marriage; and, there seems no doubt but that in France the general preference is for community. It is the best known system, and, furthermore, not only the most practical, but also the most generally accepted. Experience proves that it is not impossible to reconcile its retention with the reforms which may appear desirable. We believe that a revision of the Civil Code will lead to a recognition of the need of substituting community of acquests as the statutory system in place of the present community, and to the need of bettering the condition of the married woman.

Community limited to acquests is much more just and conformable to the presumed intention of the parties than statutory community. It creates between husband and wife an association of

interests, without the possibility that such association will injure one at the expense of the other.¹ Almost all marriage agreements of community are agreements which establish community of acquests. It is, moreover, observable that the statutory community differs sensibly from the early community of movables and acquests. In our early law almost all the important forms of property, including offices and rents, were considered as immovables. It is no longer so to-day, and "the very considerable growth in fortunes composed of movables has merely served to accentuate more and more the difference between the community of our early law and that of the Civil Code."²

It is objected that statutory community is the system for persons who marry without express contract, and that without such contract it is impossible to prove what each party brings in personal property. Nevertheless, when we study the question of proof, we see that we have greatly exaggerated the difficulty. It has not discouraged foreign legislators who have made community of acquests the statutory system. In countries which have adopted the system of administrative union, the difficulty of proof arises quite as much as in the countries adopting community of acquests. There is, moreover, a whole class of movables, whose source may be established as easily as that of immovables. Such are administrative offices, the good name of a business, choses in action, registered securities. The difficulty exists, properly speaking, only in the case of certain forms of property, such as securities to bearer, money, and chattels. Most legislations require no inventory or notarial declaration. They simply establish in favor of the community estate a presumption, which may be rebutted by any form of proof. Greater strictness may be shown in the exceptional case where the exercise of the wife's right to take back her property would place her in conflict with creditors. Admitting even the necessity of an inventory, why not permit it to be drawn up over a signature and dated? The inventory would always cost much less than a marriage agreement. Lastly, we may remark that the present system, so rigid in the matter of proof, does not avoid falsification or exaggeration of the values of the property brought by each party. The notary does not know whether the objects described to him

¹ As its name indicates, community limited to acquests is a régime by which the association of property is restricted to acquests arising during the marriage from revenues of the separate estate of each or from the industry of the two.

² *Tissier*, "De la communauté d'acquêts envisagée comme régime de droit commun", p. 6.

have really been contributed, or whether their value has not been overstated.

§ 33. **Husband's Excessive Powers under Community.** — If we look at the most ordinary condition, that of the household in which a livelihood is gained from day to day, we cannot but recognize that the French Code took no precaution to prevent these resources from being turned away from their normal destination.

The powers of the husband over the property constituting the community are excessive. He may, by Article 1421, sell, alienate, or mortgage it without his wife's joining. How often has it happened, especially among the working class, that the husband, to raise money, has sold all or part of their chattel belongings, objects of prime necessity, the condition of their work and their existence, those even which the law in its humanity exempts from seizure. He need give no reason, he need not account; the property forming the community is bound for all his debts. The situation is different in the wealthy class, where the wife has been able to take precautions, and where her security, which is in the form of a lien upon her husband's property for the restoration of her estate, results in associating her in the important transactions by which the husband alienates the property of the community or even his own separate estate.

The wife pays the common expenses, represents her husband, only by virtue of an implied power always considered revocable. According to the Code the husband may dispose not only of what he makes, but may also appropriate what his wife has gained by her labors, or he may demand or withhold her salary. If he dissipates or mismanages the property entrusted to him, the wife has recourse to a proceeding for separation of their estates, — an effective remedy for those who, having a private fortune, obtain its restitution; a useless protection for those who live off their daily earnings. Moreover, the procedure is too long and complicated, and its results too uncertain. Let us see what has been done and what is proposed as a remedy.

§ 34. **The Wife's Savings.** — As to the wife's right over her own savings, such progress as has taken place results less from the legislation itself than from the manner of its application. In reality the provision inserted in the Law of April 5, 1881, was far from recognizing a right belonging properly to the wife.

An earlier attempt had already failed. In 1872 a proposal was made to the National Assembly to give the wife power to deposit in the government savings institutions without the authorization

of her husband. The measure laid itself open to the criticism that it impaired the husband's power, and was contrary to the principle of the community system. Would not the wife, it was said, who may alienate none of the joint estate, profit by this right to turn aside a part of the resources of the community so as to create a separate fund of her own? Some years later, when the proposal was again broached, in order to reassure the jurists whose opposition was feared, the principle of an implied agency was suggested. It was not a question, it was said, of recognizing a right peculiar to the wife, but merely of considering her as having an implied power from her husband. When she deposited or withdrew funds from a savings bank, she was to be regarded as acting in the name of her husband, as his representative. The latter, when he so pleased, might revoke the power, notify the savings bank that he opposed the withdrawal of the funds, and, consequently, bring the particular sum within the community estate, of which it had not rightfully ceased to be a part. By the terms of Article 6 of the Law of 1881 upon postal savings banks, married women, without respect to the property system under which they married, were permitted to open accounts without their husbands' joining in the act. They might withdraw the funds entered in their passbooks without such assistance, except when he gave notice of his opposition.

(1) *Practice under the Law of 1881.* — The application of the law rapidly effected important results. As early as 1882, 52,345 requests to open accounts were made by married women; but since they were not yet fully aware of the option which they might exercise, more than half (30,803) came provided with their husbands' authorization.¹ Very soon the proportion was reversed, and the custom spread of adding in the request for the account the words: "Without the authorization of her husband." But since even in this case the right of opposition subsisted, how was it to be exercised? The law contained nothing upon the point. It would, therefore, seem that the husband needed only to appear and make his relationship known. If married under the system of statutory community, the sums deposited by the wife formed part of the community estate. By opposing her withdrawal of the funds, he himself set up a claim to withdraw them. To this claim the bank replied: "Serve a formal notice of opposition upon us by the usual legal officer." As a result certain preliminary steps had to be taken

¹ We have obtained this information from the interesting report made to the "Société d'études législatives" by *Morizot-Thibault*; cf. "Bulletin de la Société d'études législatives", Vol. I, p. 60.

and the necessary costs advanced for the opposition. This formality completed, the husband appeared at the bank and was again refused. "Your notice of opposition," he was answered, "has merely resulted in placing the sums deposited by your wife out of her reach; to withdraw them, bring us your wife's consent or an order of court." Thus the husband was forced to engage in a legal proceeding, to summon the bank as defendant, and to join his wife as a party. Expense, annoyance, and complications followed that were well calculated to discourage him. If he persisted, his would no doubt be the last word; the court would be forced to decide that the Law of 1881 in no way impaired the husband's powers, and that he might, by his control over the community estate, dispose of the sums deposited by his wife. Logically it would seem that the bank should be condemned to pay costs, since its resistance was unjustified. A few decisions have in fact done so, but the Tribunal of the Seine decided against it, no doubt influenced by the particular facts of the case. As a general rule, the husband who endeavored to secure his wife's savings did not strongly engage the court's sympathy. This practice and these decisions succeeded in discouraging opposition. In twelve years, out of 385 notices of opposition served upon savings banks, 270 were abandoned or payment was made to both parties; 115 remained unsettled, and of these twelve only were taken to the courts.

(2) *The Law of 1895.* — Nevertheless, there was a feeling that the practice followed did not conform to the law. The desire to reconcile it inspired a Government bill. In the draft of the law upon savings banks, an article expressly mentioned the right of married women to open accounts, and, on the demand of two Deputies, Lavy and Gamard, the restriction which made an exception for the case of the husband's opposition was suppressed. Thus passed by the Chamber, the text was adopted without observation on first reading in the Senate. Before the second reading, unfortunately, a change was made; the Chauvet amendment called for the re-establishment of the old provision. The text of the draft was sent to committee. As Morizot-Thibault has put it, the law felt the heavy hand of a lawyer.¹ The outcome was that the Law of July 20, 1895, did not stop at perpetuating the right of opposition, but systematized and facilitated it. The government must advise the wife by registered letter. Unless she appeals judicially within one month from her husband's opposition, the latter may receive the balance on deposit if the particular property system

¹ "Bulletin de la Société d'études législatives", Vol. I, p. 62.

under which he married gives him the right. The wife is thus placed in a much less favorable position; it is she who must take the appeal, engage in litigation. The husband need only remain quiet and appear at the termination of the prescribed period.

Once more, the formality of the authorities succeeded in correcting the law. To realize in what way, it will be necessary to examine the circular of instruction of July 24, 1895, addressed by the Ministry of Commerce to the directors of the government savings banks: At the expiration of one month, if the wife has taken no appeal, the husband may no doubt obtain payment, but upon the following conditions:

1. He must bring the passbook constituting his wife's title. Thus payment is not possible if the wife succeeds in keeping the book or hiding it. It is of no consequence that her husband may lawfully require her to give it up; the bank need not involve itself in such difficulties. If the bank is asked to deliver a duplicate passbook, it refuses, the original being neither lost, destroyed, nor stolen from its owner.

2. The husband is required to establish his identity, his status as husband of the owner; he is obliged to prove his right under the marriage agreement by production of a certified copy of the minutes of the marriage, and of the marriage contract, or proof that there was no agreement. This still does not satisfy. As demands for withdrawal of savings and oppositions are frequently incidental to divorce suits, he is required to prove that he is neither divorced nor separated. How is he to prove this? For the divorce, a recent extract from the registry of marriages is sufficient if it mentions no divorce; but in the case of legal separation, proof is more complicated. Where divorce or separation has been pronounced, a certificate of ownership, given by a notary, will make known which of the two parties has a right to the payment, in view expressly of the decree and the liquidation of the respective estates reclaimed by husband and wife.

The circular of instructions closes with a final observation, not without irony: "You may besides require such other additional evidence as you may deem necessary." We may well believe that, under these conditions, repayments will not be numerous. The Law of 1895 increased the number of oppositions. In the year following its passage, the number was double that of the preceding year; but, out of these oppositions, only three repayments were secured. In a certain number of cases, there was neither repayment nor relinquishment, and as an opposition is

effective only during five years, if not renewed before the expiration of that period, it lapses of itself.

§ 35. **The Wife's Earnings.** — Under the Civil Code the wife's earnings form part of the common assets. In reality, they were generally paid to the wife, as the implied agent of the husband. But, as the agency was always revocable, the husband did not exceed his right when he demanded that the employer pay his wife's salary over to him. The investigation undertaken by the "Société d'Études Législatives" gave reason to believe that such demands were rare. But that the abuse was generally exceptional constituted no objection to reform. Rather was it proof that custom was in this respect farther advanced than statutory law; the reform ought to be the more acceptable in that it accords with public opinion.

This reform, long demanded, made ripe by the discussions and reports of the "Société d'Études Législatives",¹ was realized by the Law of July 13, 1907, which aims not only to recognize in the married woman a personal right over her earnings, but at the same time, to insure the obligation of each party to contribute to the expenses of their married life. As the problem was to remedy exceptional situations, certain proposals tended to give a like character to the reform. Thus under the proposal of Dupuy-Dutemps, when the husband jeopardizes the interests of the household by his misconduct, the wife may, without demanding a legal separation of their estates, obtain from the court the right to receive herself the earnings from her work. So also in the project presented by Cauwes² to the "Société d'Études Législatives" the register of civil status must ask the intended wife at the time of marriage if she proposes to reserve control over her movables and also the profits and earnings arising from her labor. These proposals constituted exceptions that were excessive and difficult of acceptance. Judicial action was a complicated remedy, often slow, and productive of animosity. The declaration made at marriage seemed an act of mistrust such as the woman would not as a rule dare to make. Moreover, at such a moment she is not conscious of the risks to which she may be exposed.

It has been judged wiser to give the reform a more general application and to admit a right in all married women. By Article 1,

¹ A. Tissier, "Des modifications à apporter aux droits et pouvoirs de la femme mariée quant aux biens et aux produits du travail et de l'industrie", in "Bulletin de la Société d'études législatives", Vol. I, p. 25.

² "Bulletin de la Société d'études législatives", Vol. I, p. 203.

without exception as to matrimonial system, the wife acquires a right in herself to her profits and wages. As voted on first reading, the law authorized a waiver in the marriage contract of the benefit of the law. It was feared that the waiver might become customary and render the reform illusory. Any contrary provision in the marriage contract was, therefore, declared void. Thus the principle established by the Law of 1907 applies without distinction to all married women.

(1) *What are Earnings.* — Over what property does the wife acquire this personal right? Here also a broadening of the field of application of the law was successful. At first attention centered upon the profits and wages of the wife who was a wage-earner or was employed out. The feme trader or woman doing business on her own account was not considered. It seemed simpler not to form classifications. It was thought that the abuses occurred not alone among the wage-earning class; in the middle class, too, the wife was often obliged to work because of her husband's neglect.

The same question arose as to whether her right affected solely her wages or extended to her savings. A restrictive system, adopted by the Belgian Law of March 10, 1900, recognizes solely in the wife the right to receive her wages and to employ them for the necessities of the home. If she invests or uses them, her husband preserves all his rights over the securities acquired. But a reform of this sort is insufficient and accomplishes almost nothing. What is most to be feared is not that the husband will claim the wages as paid, for we know that an abuse of this sort is rare. What most frequently tempts the husband is the savings put by, the investments which the wife has made with her earnings. It is the protection of this investment that the law ought and will insure. If it does not, the law is an incentive to the wife to spend it, even uselessly. Often, moreover, such economies are made in view of an approaching expense, as the payment of rent or the outfitting of a child. It should not be left at the mercy of the husband who has not contributed to produce it. Thus the right which the Law of 1907 recognizes in the wife is now understood in the broadest sense, and includes the wages or salary of any kind and profits arising from a profession, industry, or trade separately carried on and the savings which she puts aside from them.

As to the property constituting the reserve, two possible systems presented themselves. It was possible to arrange a partial separation of estates or to retain the reserve as a community asset.

Partial separation had the advantage of simplicity, of adapting itself to every form of matrimonial system, and of placing the property constituting the reserve in a clearly defined position. The wife acquired the complete control of it, she retained it in every eventuality and subject to no partition. The system, however, appeared excessive to many minds. Was it not possible to give effective protection without making so large a breach in the principles of community? If the husband works and saves for the community, is it not unjust that the wife should earn and save for herself alone?

But the "Société d'Études Législatives" maintained that in the community system the wife's profits and wages ought not to cease to form a part of the community estate. They should belong to the joint assets, but should escape the control of the husband. It seems like a duplication of the implied agency; there were to be two managers instead of one, each having his or her own peculiar functions. The husband managed the larger part of the estate and the wife the fraction forming her earnings. In this there was nothing repugnant to the idea of community, which consists essentially in the creation and partition of a joint fund. Unity of management is not its essential character. The proof lies in the fact that, in the community of the old customary law, the wife was associated only in certain acts of the husband. The community system, as Saleilles said,¹ must be made more flexible and lend itself to the changes taking place in customs and ideas, or else disappear.

Such has been the solution by the legislator. Where there is community, or community of acquests alone, the property reserved forms part of the joint estate and is subject to the partition of such assets. Under all those matrimonial systems not admitting either of community or of community limited to acquests, the estate reserved remains separate to the wife; as to it she is regarded as under the system of separation of estates.

(2) *Scope of Her Power.* — The Law of 1907 recognizes a large power in the wife over her reserved property. It confers the same rights of control that are granted by Article 1449 of the Civil Code to the wife after a decree of separation from bed and board. It goes even farther, for Article 1 has decided in the wife's favor certain questions with regard to her reserved estates which had been disputed in the case of the wife separated by judicial decree. For example, she may place her savings in personal and real invest-

¹ "Bulletin de la Société d'études législatives", Vol. I, p. 148.

ments; she may for a consideration alienate, without her husband's authorization, the property which she has acquired; she may sue and be sued without authorization upon all matters relating to rights touching these sorts of property. The only act prohibited is the making of gifts.

Her reserved property may be seized by her creditors, but is exempt from attack by her husband's creditors. Exception is made, however, in favor of those creditors who have contracted with the husband for household needs, provided that, under the matrimonial system adopted, the particular property would have been, prior to the new law, in the hands of the husband.

On the other hand the husband and the community estate are not subject to the debts contracted by the wife without authorization and within the limits of her powers, upon the credit of the reserved estate.

The formation of this small reserved estate raises a somewhat difficult question of proof. The law goes no further than to declare that the validity of the wife's acts shall depend solely upon proof, offered by notarial deed or any other means expressed in the marriage agreement, that she is carrying on separately a trade distinct from her husband's. The responsibility of third persons with whom she has dealt upon furnishing this proof is not affected. In case of conflict over the origin or nature of the property, the wife may offer proof by any means, even by oral testimony. Proof by general report is alone excluded.

It seems wise to reserve to the husband a power of appeal to obtain the annulment of the wife's powers where she abuses them. The husband petitions the court in chambers, or even, in an urgent case, he may be authorized by a preliminary decree of a single judge, to oppose the wife's projected acts. The judge will hear and weigh the husband's complaint. As it did not seem possible to anticipate every case of abuse, the law merely cited as examples the cases of dissipation of her estate, or of imprudence or mismanagement.

(3) *Effect of Dissolution of Community.* — Upon dissolution of the community the reserved estate is merged with the property over which the husband has control. Both in fact equally form a part of the joint assets. Logically it was necessary to admit that the wife, by renouncing community,¹ lost all right to these assets and consequently sacrificed her savings. Such logic seemed very

¹ [By Article 1453 the wife after dissolution of the marriage may elect to accept or renounce community. If she accepts, a partition of the joint

harsh; if the intention was to maintain the principle that the husband cannot either directly or indirectly touch the wife's earnings, it should have been recognized that the wife, in spite of her renunciation, could claim her savings. The latter solution, already adopted by the Swiss law of the Canton of Geneva, became also that of the French Law of 1907. The wife who renounces community on dissolution retains her reserved estate unimpaired and free of all debts other than those for which it had been previously pledged. The same right is recognized in her heirs, but only those in direct line.

§ 36. **Penalty Attaching to Marriage Obligations.**—The reforms described were of themselves insufficient. Experience has shown the necessity of more energetic guarantees for the reciprocal obligations of husband and wife and for their duties towards their children. It is a problem that has been given special attention by the drafters of the later codes. The Swiss Civil Code provides a series of measures intended to safeguard the wife's interests: termination of the obligation to live with her husband, settlement of an allowance for maintenance, withdrawal of the husband's control over her estate, granting of power to the court to order the husband's debtors to pay in whole or in part into the wife's hands.

In France, there is no other protection than a judicial order of separation of estates, or divorce, or a decree of separation from bed and board. The separation of their estates is not a practical solution for the working woman; divorce or a decree of separation often overreaches the purpose, destroying the family life. The new law borrowed the solution adopted in the Dupuy-Dutemps draft. The means which it established apply indiscriminately to wife and husband.

Whenever the earnings of the husband or wife are squandered, or either of them fails to contribute proportionately to the expenses of the home, the other consort may intervene by a simple and summary proceeding. The party in fault is summoned before a justice of the peace by a registered letter sent by the clerk of the court, stating the nature of the complaint. The two parties must then appear and be heard together. The justice of the peace may authorize the complainant to make his claim in the form of an attachment of a part of the wages paid to the defendant and earned by the latter. The notice of the judgment given to the defendant and to the third party debtor is equivalent to appropriation of the

estate, including assets and debts, takes place: if she renounces the joint estate, both assets and liabilities go to the husband absolutely. —TRANSL.]

sums of which attachment was authorized. The judge's decision may be executed without stay, although it is contested or appealed and although no security is entered.

This is without a doubt a first-rate penalty, but it is too often ineffectual. To escape attachment of the wages, it is enough to change one's domicile or place of employment. We favor the adoption of a more energetic measure, borrowed from the criminal law, embodying the penalty of imprisonment against a husband who neglects to provide necessities for his wife and minor children. Several foreign legislations already furnish examples. In the State of Massachusetts an Act of April 17, 1885, created a penalty not exceeding twenty dollars or imprisonment not exceeding six months for one who unreasonably neglects to provide for the support of his wife or minor child. Article 1 of the Norwegian law of July 6, 1892, obliges the father, if he abandons his wife and children, to provide support in proportion to his resources, the amount being determined by an order of court. If he avoids his obligation without there being any property upon which execution can be had, he may be arrested and placed in an institution at hard labor until he has paid or given security. The term of imprisonment may not exceed three months. Finally, there is the Criminal Code of the Canton of Neuchâtel, which provides by Article 207 that "Any person who, being able by work or having other means to supply the needs of relatives in direct lines, ascendants or descendants, husband or wife, nevertheless leaves them in want, or abandons his family, leaving it without resources, shall be punished by imprisonment not exceeding six months or less than one month, or by lodgment for not less than one year or more than three years in an institution at hard labor; in addition he may be deprived of his civil rights for a period of ten years."

We are far from believing that penalties suffice for everything. But, because their operation is imperfect, we need not conclude that they are without effect. The causes of a social phenomenon are always infinitely complex. It is not possible to suppress all; but we may at least modify or influence certain of them. And there seems no doubt but that one of the causes for an abandonment of family is its impunity.¹

¹ Cf. "De la nécessité d'ériger l'abandon de famille en délit", in "Bulletin de la Société d'études législatives", Vol. I, p. 76.

IX. STATUS OF MINORS: (1) ABANDONED CHILDREN

§ 37. **Two Conceptions of Parental Power.** — The history of the status of the child has often been likened to the history of the status of the married woman.¹ Two great currents of ideas have contributed to fix the system of law governing parental powers in the principal legislations of Europe. The first came from the Roman law, the second from Germanic law. According to Roman ideas, parental power was a right established in favor, and in the interest of, the party exercising it. To this conception was opposed the maxim of the customary law, first formulated in the Customary of Senlis, in 1539, and generalized by Loysel, who reproduced it in his "Institutes": "There is no right of parental authority." This rule, often misunderstood, simply means that the "*patria potestas*" of the Roman law was not accepted in the provinces of customary law. It did not mean that children were not subjected to any authority at all, but merely that the authority rested upon other principles and had other limitations than in Roman law. The general idea was that it was not created for the benefit of the father, and that it was no more than a power of protection developed in the interest of the child.

From this has flowed a series of consequences: (1) It belongs both to the father and mother. The father exercises it alone during marriage; but after dissolution of the marriage or in case of a suspension of his rights, its exercise passes to the mother. (2) It ceases when the child no longer has need of protection. Thus, parental power terminates when the child becomes of age, and that was fixed by most of the Customs at twenty-five years; or it may end by emancipation before the age of majority, by the father's express or implied act. It is worthy of note that emancipation was admitted to result impliedly from marriage.² "Hearth and home emancipate", it was said; "married children lose both bread and meat;" that is, they are regarded as emancipated. "A man and woman when married are considered emancipated." Holding certain offices of dignity entailed quite commonly the same consequence; as examples may be cited several judicial offices, the bishopric and even, in certain Customs, as in those of Bourbonnais, the priesthood. (3) Parents had over the property of their children a mere power of management without obligation to account. We must also mention, however, the institution of

¹ *Paul Viollet*, "Histoire du droit français", p. 418.

² "Coutume de Paris", Art. 239.

“nobleman’s custody” and of “plebeian custody”, which conferred upon the parents the rental of the property under their management during the child’s minority.

Such were the chief differences between the two systems. The long struggle between the two conceptions ended in the triumph of one of them. Parental power ceased to be a right in favor of the person exercising it, and became a simple power of protection, a means by which the father fulfils his duty toward his child. “Nothing less resembles the parental power of the ancient law,” said Berlier, in the course of the drafting of the Civil Code,¹ “than the authority of the father and mother, which forms the subject of Title IX; we used new words to express new ideas.” Care was in fact taken to avoid the term “parental power.” It is still found in the caption of the Title, but in all the articles of the Code the word “authority” was substituted. “The authority of the father and mother over their children,” said Albisson,² “having no other direct cause or object than the latter’s welfare, is not, properly speaking, a right, but only a means of accomplishing fully and without hindrance an indispensable and sacred duty.”

(1) *Conception of the Civil Code.* — So the Civil Code found in parental authority merely a means of protecting and safeguarding the child’s rights. It went no further, however, than to establish this principle, without systematizing means or attaching penalties. We are told in a general manner by Article 203 of the Civil Code, that parents must bring up their children; that is (as the preparatory report of the codifiers formally declared) educate them. The principle of obligatory education was thus virtually recognized. The Law of March 28, 1882, has, properly speaking, merely developed the consequences of this principle by determining its scope and the penalty for its infraction.

Similarly the Civil Code was not concerned with indicating how the performance of this duty of education, imposed upon the father and mother, might be secured. It is very certain that the obligation created, by mutuality, a right in the child and, in our legal system, every right gives rise to a remedy. But who may exercise this remedy? The child cannot act by himself, unless of age; and by that time, he can himself normally meet his own needs. During minority, he is in principle represented by his father. But obviously the father cannot sue himself. The situation was

¹ Session of the Council of State, 26 Frimaire, year X; cf. *Locré*, Vol. III, p. 315.

² *Locré*, Vol. III, p. 342.

embarrassing, and for a long time text-writers made vain efforts to escape from it. Certain authors held that an action could be brought by the mother against the father during marriage; that after the death of one of the parents, it might be brought by the assistant guardian against the surviving legal guardian; and lastly, that if none performed their duty, the public prosecutor might intervene. In short, like the penalty attaching to the duty to educate, the civil action existed in theory; it was in reality almost impossible to enforce.

These deficiencies and omissions of the Civil Code have been partly met by the Law of July 24, 1889. Before the realization of this reform, the legislator had been led, in a certain number of cases, to take measures intended to safeguard the child's right to education. But they were isolated measures. We have already mentioned the Law of March 28, 1892, observing that this law defined and protected the obligation of the parents to see to the education of their children. We may also mention two sorts of provisions, the one penal, providing a penalty for parents who abandon or maltreat their children; the other permitting the State to become a substitute for the family which has been unable or unwilling to perform its duties toward the child. The State is thus led to assume ever wider attributes. Nothing is more striking than the progressive extension of the activity of that branch of the Government created in relief of children. This branch, which at first included only abandoned orphans and children, has since been extended to neglected children, and finally has come to include vicious and intractable children, whom the State endeavors to subject to a disciplinary régime.

§ 38. **State Relief of Abandoned Children.** — The first case with which we have to deal is that of parents who evade their duty or find themselves in a position where they cannot fulfil it.

The legislation governing the State relief of minors, regulated and coördinated by the Law of June 27, 1904, was for a long while contained in two acts of the Imperial period: the Law of 15 Pluviose, year XIII, and the Decree of January 19, 1811. The law of Pluviose, of the year XIII, created the system of control of children admitted to asylums; the Decree of 1811 established the conditions under which children might benefit by State aid, dividing them into three categories: foundlings, abandoned children, and poor orphans. These laws have not always been applied in the same spirit. The practice has varied not only according to period, but according to locality. In fact, State aid of minors has been

and still is a local Departmental matter. The General Council of the Department may support it more or less generously, or restrict or extend its action at its pleasure.

It will perhaps not be without value in this study, which is intended to note the changes which the law has undergone in practice, to point out at this time the variations in this practice.

At first the practice under these laws was very favorable to the administration of the task. The Decree of 1811 created an asylum where children could be left, in each municipality, and each of these asylums was obliged to have a gate where a child might be left at any time without questions asked. As is well known, this gate was a sort of revolving cage opening upon the street. In this cage the child was received. A bell was handy to warn the keeper; the gate closed as the cage turned upon itself; and the child was received with no evidence to betray the secret of its birth. Facilitated in this way, the number of cases of abandonment tended to increase continually.¹ In 1810, the number of children thus received was 70,558; in 1815, 84,000; in 1821, 105,000; in 1825, 117,305; in 1838, 127,307. This important increase in the figures was not the only question to be considered. It was also plain that the practice of the secret gate jeopardized more lives than it saved. Brought from afar by persons who took no care of them, making a regular business of such transportation, these children died in great numbers. A reaction set in; it began by the establishment of a watch over the approaches to the gates. Little by little they were suppressed. The greatest number open at any one time was 251; there were 232 in 1818; in 1869 there remained only five, which since then have been closed. In place of this system, which experience seemed to condemn, was everywhere substituted one of admission.

(1) *Practice under State Relief Law.* — In Paris, admission was not conditioned upon any formality intended as a restriction. "The General Council of the Department," said Léon Lallemand,² "takes as a guiding principle respect for the secret of the family involved and the necessity above all of safeguarding the infant life; the question of expense is a second consideration." The mother comes with her child before an employee of the Bureau of State Relief. The only thing required of her is the child's birth certificate. Often this certificate tells nothing, since the child in a large number of cases is declared to have been born of unknown

¹ Cf. *Levasseur*, "Population française", Vol. II, p. 61.

² "Histoire des enfants abandonnés", p. 278.

parents. But if there is any reason why the certificate cannot be produced, admission may still be granted. The mother is informed that, by consenting to keep her child, she can obtain milk for it. She is even urged to take this course; but if she persists in her demand, the child is never refused. However, the right is reserved not to make known the place where the child will be kept. She is warned that she can only receive news of it four times a year, and that the news will merely be whether the child is alive or dead. This is the only harsh provision that survives in the formalities attending an abandonment. Experience has shown that it was the sole means of avoiding innumerable abuses; but the management of the asylums, who have desired merely a means to protect themselves, admit in practice many moderations of the rule. The locality of the child is not always kept an inexorable secret, and frequently ties are permitted to grow or continue between the family of origin and the child who has been admitted.

In the Provinces, on the other hand, the rules observed were quite different. The policy in force was almost everywhere very restrictive. The General Councils of the Departments, which had been authorized by the Law of August 10, 1871, to regulate the organization of the State relief for children, determined the forms and conditions of admission. Many Departments were mainly concerned with limiting their expenses, and to this end imposed conditions of a nature to render the admissions few. There were conditions of residence and of origin; there was the requirement of a preliminary investigation, and the exclusion of legitimate children. The Law of June 27, 1904, generalized the liberal practice followed by the Department of the Seine. Articles 8 and 9 of this law require that the bureau of admission shall be open day and night, and that admission of a child appearing less than seven months old may not be refused. While facilitating admission, effort is, nevertheless, made to encourage so far as possible the acceptance of another system of relief, that of the supply of milk. This leaves the child with its parents and has the advantage of being cheaper for the Department. The child, having received an order of admission, is thereafter placed under the authority of the Bureau of State Relief. By Article 11 of the Law of 1904, the protection of children of all classes and the guardianship of beneficiaries of State Relief are within the jurisdiction of the Prefect, or his representative, the Departmental inspector. In the Department of the Seine these duties are exercised by the Director of the Bureau of State Relief of Paris. As guardian he is assisted by a "family council" con-

sisting of a commission composed of seven members elected by the General Council of the Department and reelected every four years.

In short, it is evident that the admission of children to the assistance of the Bureau of State Relief involves consequences almost equally important in law and fact. The child without known parents, or what amounts to the same thing, the child who has been abandoned by its parents, is in a true sense adopted by the State. It is in fact the State which must supply its needs, bring it up, educate it, and aid in finding it a position and in playing a useful part in life. It is in a sense an application of communism, and we might add that this fact also constitutes its evident condemnation. It is not only that such a life for a child, in spite of all that public charity can do for it, appears as the worst of two evils, a pitiful abnormality; it is rather that the State finds itself forced to admit that it can succeed in the rôle undertaken, that of replacing a family, only by calling in another family. In fact, the administration of the State Relief does not itself raise the child in the asylums and wards provided. Its constant practice is to endeavor to place the child with some family; and it may be said that the child's future depends largely upon this choice of a home. If it finds only hard and rough masters where it is placed, it is almost inevitably lost to society. On the contrary, if treated with kindness and loved, if it finds in a word a new home, it has a chance of adjusting itself to its new environment, of being happy and becoming an honest citizen.

When we turn to statistics to learn what becomes of children who receive State relief, we find that a fairly large number, about one tenth, are withdrawn before becoming of age and restored to their parents. When a child is reclaimed by its parents, it may be restored if its guardian finds, after consulting with the "family council", that such a change is in its interest. The administration may, besides, authorize the child to be returned to its parents on probation, and during the period of probation the supervision of the State Relief continues for at least a year. At the expiration of that period, the restoration becomes definite.

X. STATUS OF MINORS: (2) NEGLECTED CHILDREN

§ 39. **Protection against Parents.** — In all periods a greater or less solicitude has been felt for orphans, cripples, and parentless children; but it is only very recently that attention has been paid

to neglected children ; by whom we mean children who have need of being protected against their parents.

The number of such children will never be known. It is enormously greater than we might surmise. We may at least get some idea of the importance and gravity of the evil by reading (to mention but a single document) the report upon the exploitation of children presented in 1892 by Georges Berry to the Municipal Council of Paris. It would seem that such exploitation had become an almost public profession in the cities, and what is more, a very lucrative one. We can imagine the sufferings of these little children — pale and suffering, exposed to the weather, carried in arms to excite the pity of the passer-by — when we realize that parents receive a franc and a half to two francs a day for the loan of their child, and three or four francs a night, according to the circumstances and the severity of the weather.

For this class of children, private charity is powerless. If the child is a victim of the brutality or evil example of its parents, what can charity do? It can not free the child from its parents. If you are accosted on the street by a tiny beggar, and you refuse it alms, you are without heart ; and yet, if you give, you encourage the inhuman exploitation of which it is a victim.

§ 40. **Relief Legislation.** — State relief, at least in Paris, has not, however, remained entirely inactive. Alongside the aid furnished to abandoned children, the General Council for the Department of the Seine organized in 1881 a service in aid of the neglected, applicable to certain classes of children, notably those “whose parents, by reason of chronic illness, indigence, or the nature of their employment, or by reason of their vices, declare that they are unable to watch over and provide for their children.” This service became well established and developed rapidly. From 1881 to 1889 it succeeded in enrolling each year from seven to eight hundred children. Meanwhile private initiative had organized several charities, among them, the “*Société Générale de Protection pour l'Enfance Abandonnée ou Coupable*”, created in 1879 by Georges Bonjean ; the “*Union Française pour le Sauvetage de l'Enfance*”, founded under the presidency of Jules Simon in 1888, which at the end of that year, after a few months' existence, had already handled 144 cases and had received and definitely placed in homes as many as 37. Unfortunately the law too often renders all such acts of devotion nugatory. To receive the children, the consent of their parents was necessary ; it was also necessary in order to keep pos-

session of them. And yet in many cases it was against their parents themselves that it was necessary to protect them.

(1) *Law of 1889.* — Thus the need of legislative reform became imperative. The initiative came from the "Société des Prisons", which had as early as 1878 made this problem the object of an important report by the Protestant minister Robin.¹ His conclusions led to numerous discussions, and became the occasion for new studies in which figured almost all the philanthropists who had contributed to the elaboration or enforcement of the laws in protection of children. January 27, 1881, a draft, in the nature of a conclusion from these debates, was presented to the Senate by Roussel and several others. A few months later the same body was called upon to consider another draft prepared by an extra-parliamentary commission and adopted as the Government bill. But, after long vicissitudes, all steps were halted by the magnitude of the plan, which completely remodelled the legislation in protection of abandoned children; by the increase in the financial burden involved in its adoption; and by the difficulty of even estimating the expenses.

To save at least part of the reform, the Government decided to omit the most important provisions from the body of the draft, sacrificing those that would occasion the greatest expense. It was this restricted plan that became the Law of July 24, 1889.

This Law is concerned primarily with neglected children, and divides them into two classes: (1) those who are in moral danger through the delinquency or vices of their parents; (2) those left without watching by their parents by reason of indigence, sickness, or any other cause. In the first case, that of the unfitness of the parents, the statute deprives them of their rights. When they are not unfit but merely in a position where they are unable to fulfil their duties, the statute authorizes the courts to decree a transfer of the parental power, investing it in persons or charitable bodies who consent to take the children. Of these two divisions of the Law of 1889, it may be said, as did Bruyère,² that they are in reality two distinct laws embodied in one. The one decreeing the forfeiture of the parental power, would appear primarily penal in character; the other, which tends in practice to assume a predominant influence, is a law of State Relief.

¹ "Bulletin de la Société des prisons" (1878), p. 798.

² "La loi de 1889 et son application"; report to the "Comité de défense des enfants traduits en justice", p. 17.

§ 41. **Forfeiture of Parental Authority.** — The provisions contained in the first part of this bill answers three questions: When may forfeiture of the parental authority be pronounced? What procedure shall be followed, and what are the effects of the forfeiture? How may the forfeiture terminate?

The law distinguishes two classes of cases; one particularly heinous, in which the parents' forfeiture is compulsory; the other in which the forfeiture is optional. The cases of compulsory forfeiture are enumerated in Article 1. In all these cases the forfeiture presupposes not only a judgment entered against the parents, but a judgment for a crime or wrong committed against the child, or for a crime committed by the child in which the parents have participated as accessories or accomplices. Under these conditions we do not believe that it is possible to reproach the law, as has sometimes been done,¹ with excessive rigor in declaring the forfeiture compulsory.

Our regret is rather that the authors of the Law of 1889, in declaring the forfeiture, did not understand the necessity of providing for the observance of their rules. The public prosecutor is not bound to see to their precise enforcement. In fact, it frequently happens that he forgets or neglects to do so, and that the judgment makes no mention of the forfeiture. Many writers admit, it is true, that in such case the disability of the parent results without having been expressly stated. But that is an opinion which has scarcely more than a theoretic interest. Experience has shown that unless the forfeiture is declared it is in reality without efficacy; it is not carried out, and no one bothers about the children.

The cases of optional forfeiture are enumerated in Article 2. The first four assume a prior criminal sentence against the parents; in the last two, on the other hand, the forfeiture may take place without sentence.

The sentence mentioned is not alone that resulting from particular crimes or wrongs; paragraph 1 has a general character and is applicable to all parents sentenced to criminal punishment for an act within the common law.

§ 42. **Forfeiture without Penal Sentence.** — The most striking cases are those where forfeiture may be pronounced even without a penal sentence. The first of these is where a child under sixteen years has been sent to a reformatory under Article 66 of the Penal

¹ Cf. *de Gavardie's* speeches in the Senate, May 26, July 7, 1883: "Journal officiel", pp. 569, 836.

Code. It was thought that in such a case the child's delinquency is most often explainable by the want of care or the bad example of the parents.

This is the provision, as we have said, that opens the widest field to the operation of forfeiture. The courts may pronounce the forfeiture against a father and mother who have incurred no sentence, but who by habitual drunkenness or by notorious and scandalous misconduct or ill-treatment, endanger the health, safety, or moral well-being of their children. In reality this single provision embraces and supplements all the others, and it is, therefore, the one that is invoked in the majority of cases. The law leaves a broad discretion in the judge; and it is very clear why, in its circulars of instruction relative to the application of the law, the Department of Justice recommends to the public prosecutor to exercise his powers with great circumspection. But this is not the danger, at least up to the present time, that disturbs those interested in infant protection. We shall see, when we endeavor to estimate the importance of the results obtained, that the courts more justly deserve the reproach of having exaggerated the prudence counselled by the Minister of Justice.

The legal action to obtain a forfeiture may be commenced only by certain relatives or by the public prosecutor. According to the terms of Article 3, the relatives entitled to bring the action are first cousins or nearer. In reality, in most cases where forfeiture may be declared, the family has been destroyed or disrupted. It almost always happens that the sole initiative that can be counted upon is that of the public prosecutor.

Two jurisdictions may be called upon to take cognizance of the action. Normally, jurisdiction belongs to the civil tribunal of the domicile or residence of the father or the mother of the child; ¹ exceptionally, the criminal courts when pronouncing a sentence such as will allow a forfeiture, may then declare the forfeiture at once, if they consider themselves sufficiently in possession of the circumstances.² The procedure in this latter case may be very rapid. On the contrary, when the action is brought before the civil courts, the examination of the case becomes much more complicated; for the statute, based upon provisions of the Code of Civil Procedure relating to the loss of civil rights, prescribes a series of formalities into the detail of which we may not enter here.

In all the features of this procedure a twofold legislative intention is apparent. It has aimed both at rapidity by invoking the

¹ Art. 3.

² Art. 9.

jurisdiction of the court in chambers, and at the same time at preserving for the hearing a special importance by surrounding it with certain guarantees. But these intentions are very difficult to reconcile. When we wish to advance prudently, we must be resigned not to move rapidly. And this very thing has happened. In actual practice we see how dilatory this procedure has been made by the need of fulfilling so many formalities. Its dominant character becomes evident: It is too minute and complex.

§ 43. **Effects of Forfeiture.** — Let us suppose that the action has terminated and the sentence been imposed. What will be the consequences of the forfeiture? The law appears extremely rigorous in this respect. It admits of no distinction: forfeiture is absolute. It applies to all children born or to be born; it includes all the attributes of parental power, all the rights which the Civil Code or subsequent laws confer upon parents over the person and property of their children; it leaves subsisting between them only a reciprocal obligation to furnish support.

To whom go the rights taken from the father? If the law were consistent with principle, it would be to the mother, while alive and having capacity, to whom these rights would be transferred. The Law of 1889 has not hesitated to introduce a very important derogation upon the common law in this respect. Under Article 9 the court, on declaring the forfeiture, or at least on arranging the guardianship, decides whether, in the child's interest, the mother shall exercise the rights taken from the father. Considerable opposition was directed against the extension of the forfeiture to the mother when it was the father alone who was found guilty of the acts justifying it. However, we feel convinced that this rule, though certainly harsh, was the only means in the majority of cases of insuring a real enforcement of the law. By the mere fact that they live together, the mother, though admittedly an accomplice of the wrongful conduct of the father, would have remained as powerless as before to prevent it.

(1) *Voluntary Guardian.* — By excluding, or at least permitting the exclusion, of the mother in the majority of cases, the law had to consider the provision of a guardian for the child. Experience had taught that all prior laws which had pronounced a forfeiture in certain cases had remained almost inoperative, since they contained only penal provisions. In doing away with parental power, no care had been taken to indicate any person by whom the child was to be raised. The authors of the Law of 1889 profited by this experience. The law set out from the principle that the guardianship of the

common law was a mode of protection preferable to all others. It sought, therefore, to apply it wherever possible. To simplify and facilitate its operation, the court was assigned the duty of naming the child's guardian. It did not go so far as to make acceptance of the guardianship obligatory; but, to obtain acceptance the more easily, the guardian was declared exempt from the lien ordinarily imposed by law in favor of the ward. Other provisions in the same spirit facilitated the creation of an exceptional form of guardianship more advantageous to the child. This was known as voluntary guardianship. It might in fact happen that a person charitably inclined would agree to bring up and assume charge of one of these children of misfortune, and the statute has sought to encourage such acts of kindness. Article 13 provides that, during the action to forfeit the parental authority, any person may request the court to recognize him as voluntary guardian, on condition that he obligate himself to support and educate his ward until the latter is in a position to gain a livelihood.

The measures adopted to facilitate the appointment of a voluntary guardian of this sort, or even the usual guardian, leave no room, however, for illusion; we can not hope that as a rule a person ready to become the child's guardian will be found. In that case the law decides that the child shall be placed under the guardianship of the State Relief. Bruyère, who made this proposal and secured its adoption by the Commission of the Department of Justice (before whom he represented the administrations of State Relief) has shown very strikingly the great practical benefits of this.¹ By a simple reference to prior laws, "the child was brought under the authority of a State service organized throughout the nation and possessing the resources necessary for its functions."

The field of action of Public Aid was thus abruptly enlarged. In every Department of France there were created, alongside that branch of the service which cared for abandoned children, new functions covering the care of neglected children. The two lines of service have the same administration and direction; the children belonging to one or the other category are brought up in the same manner.

It was also necessary to meet the expense of the new service. In principle it should be supported by the parents. Their unfitness does not free them from their obligations; however, it had to be anticipated that, by indigence or ill-will, their contribution would

¹ Bruyère, "La loi de 1889 et son application"; report to the "Comité de défense des enfants traduits en justice", p. 30.

be very considerably reduced. Nearly the entire expense would necessarily be supported by the treasury of the State Public Relief ; it has been divided somewhat unequally between the State, the Municipalities, and the Departments.

§ 44. **Restoration of Parental Authority.** — In spite of the interest which it might be supposed would be felt to settle definitively the status of these children, the legislator did not desire to subject the parents to a forfeiture that was final. After some hesitation it was settled that the period of forfeiture might terminate.

In determining upon what conditions the parental authority may be restored, we have to distinguish according to the causes by which it was lost.

If the forfeiture is the consequence (whether necessary or optional) of a criminal sentence, those who receive the sentence cannot have their rights restored until after rehabilitation from the sentence. If, on the other hand, the forfeiture is pronounced upon facts involving no sentence against the parents, the demand in restitution is then not made subject to any prior condition. We need not go into the procedure. As a rule the law follows the procedure of forfeiture. If the claim is granted, the father recovers all the rights which had been taken from him. He is however held to reimburse all the expenses of the education and support of the child, unless the court order decides that, by reason of the parents' poverty, no indemnity will be required. On the other hand, if the claim is rejected, it can be renewed only by the mother, upon dissolution of the marriage.

§ 45. **Scope of the Law of 1889.** — The Law of 1889 did not stop at taking the parental authority from unfit parents. It desired not only to repress but also to prevent abuses of parental authority by easing the task of individuals or charitable institutions disposed to take over the care of children abandoned or neglected by their parents. Before this law was passed, such establishments encountered a great obstacle in their work. When they consented to assume charge of the education of a child, if the child was very young it was confided to them willingly ; and, indeed, parents often sought aid, since at that time the child was merely a burden, an expense that brought nothing in return. But when it had grown up, and was strong enough to work, when it might be hoped that the child could be made the means of a yet sadder exploitation, then the parents returned to reclaim their rights. Now parental power is inalienable ; no contract or waiver can be a defence to its

obligations. Often, to defend themselves against these arguments, institutions which had received children demanded that the father repay the cost of education. The courts did indeed declare that the indemnity was due and adjudged the father liable. But the child could not be held as a hostage to insure payment. It was first necessary to yield the parents' claims, subject to the right later to enforce a judgment, which their insolvency almost always rendered vain. And in that case all the efforts, all the sacrifices which the charitable endeavor had cost were almost inevitably lost; the child, once returned to its parents, was destined to corruption or misery.

§ 46. **Judicial Dispossession of Authority.** — To terminate these abuses, the general draft from which the Law of 1889 was taken did not hesitate to adopt radical means. It conceded that a contract between parents and private individuals or charitable institutions, approved by a Justice of the Peace, might divest the father and mother of their rights of parental authority. But, during this preparation of the draft, the Council of State showed itself strongly opposed to the idea. The spokesman for the bill declared that the validity of such an agreement was repugnant to the notion of parental authority as it had always been understood by French law; in remedying defects which no one sought to deny, was there not likelihood of giving rise to yet more serious ones, by encouraging such evasions, such a commerce in children, such methods as, under the cover of charity, might at times be merely a base imposture?

These objections led to the adoption of a compromise draft which aimed to give certain guarantees to the institutions that agree to take children under their care, without however validating the renunciation consented to by the parents. In place of a voluntary renunciation was substituted a judicial dispossession. In other words, parents were divested of their rights not by agreement, but by a judgment. The institution or individual who becomes the child's guardian does not assume the authority directly; he is merely authorized to exercise it under the supervision of the Public Aid.

Judicial dispossession may now take place in three sorts of cases:

(1) The first is when a father, mother, or guardian, having authority from the family council, intrust a child of less than sixteen years to the care of State Relief (refuges, asylums, bureaus of charity) or to private charitable organizations having recognized

authority, or simply to private individuals possessing full civil rights. In such cases dispossession is demanded at the joint instance of the parents and of the establishment receiving the child.

(2) The second case is where a child of less than sixteen years is received directly and without the parents' intervention by an establishment or individual such as just indicated. Such a charitable agency must, then, within three days, file a statement with the mayor of the municipality, or in Paris with the commissary of police, setting forth that the child has been received into its house. The mayor, or the commissary of police, forwards the statement to the Prefect and notice of it must be sent to the child's parents. If, within three months from the date of the statement, the father, mother, or guardian have not re-claimed the child, it may be considered to have been abandoned, and the law authorizes the individual or institution receiving the child to pray the court that the exercise of all or part of the parental authority be committed to them.

The procedure is as simple as possible. The court takes cognizance of the matter by simple petition, bearing the usual revenue stamp and recorded without cost. It then proceeds to examine the matter in chambers, when the public prosecutor attends. If the facts fail to fall within the first class of case, and if the parents are parties, they are summoned, as also a representative of the State Relief, and of the institution consenting to take charge of the child.¹ In every case judgment is pronounced in public session. By this judgment the authority which belonged to parents is transferred to the State Relief service, and it is merely its exercise that is intrusted to the individual or institution receiving the child. It is a distinction somewhat analogous to that (very early recognized by the courts) between a beneficial and a bare legal ownership. It is not to be understood, however, that the prerogative assigned to the State Relief possesses no practical value. Article 17 grants it capacity to sue in the child's name. It likewise results from Article 23 that the State, represented by the Prefect, exercises a constant supervision over the children confided to individuals or societies.

Dispossession is not as absolute as forfeiture; that is to say, the court does not necessarily take from the parents the entirety of their rights; certain of them may be retained. The rights of which the parents have been divested may be restored to them, but such a restoration may only occur after a judicial decree.

¹ Art. 18.

§ 47. **Criticism of the Reforms.** — For a just estimate of the value and importance of the reforms accomplished in 1889, we must guard against a first impression which is apt to be very discouraging. Almost all who felt the necessity of this legislation for the protection of minors and had long and eagerly demanded it, and had looked forward to a great improvement through its operation, experienced an early and bitter disillusionment.

First of all it had to be admitted that the law presented many and serious defects. Far from having the simplicity of English and American statutes that have been so efficient an instrument of action for all charitable societies, and have made possible the saving of thousands of children, as Bruyère says, "without even raising the formidable problem of the forfeiture of parental authority," our law of 1889 has proved at once too timid and too complex. Distinctions that were too numerous, a procedure that was too formal and minute, provisions that were often obscure, — all this was more than enough to discourage action; for, when not motivated by self-interest of considerable magnitude, there is ordinarily no hurry to know or put into practice new legislation. Since no such motive was present to insure application of these legislative measures, appeal should have been made to the nobler sentiments of society, and care should have been taken not to ignore the assistance that charitable societies might contribute. On the contrary, no right of initiative was permitted these societies; all that was allowed them was to present their complaint to the public prosecutor, who became sole judge whether they were well-founded and might be brought before the court.

Another defect that could not long delay in becoming apparent was the omissions of the law. Did it apply to foreigners? It did not expressly say so, and as the provisions governing forfeiture of the parental authority are not essentially penal, it was possible to argue that the legislation of 1889 was personal rather than territorial, and so was inapplicable to foreigners. Many text-writers endeavored to escape this consequence; but the decisions of the courts are uncertain. In this doubt, and rather than raise difficulties, the public prosecutor holds that he is not bound to act. Furthermore, the law makes no mention of illegitimate children. When it is a question of an illegitimate child that has been recognized by its father, it is at once admitted that the law applies. But even then in practice obstacles are encountered that render its operation very difficult, and these become almost insurmountable

when the matter involves an illegitimate child who has not been recognized by its father.

But there are further defects. When we turn, not to the value of the law, but to its application, to the results obtained, we find that it has met with a considerable and lively opposition, and that it has begun to have a very unfortunate effect upon the dispensing of justice by the courts.

There had been a certain want of accord between those who prepared the reform and the feelings of those charged with its application. The former, generally administrative functionaries, men of action, knew the extent of the evil. They were conscious that the only means of protecting the minor, exploited by its parents, abused and abandoned, was to take it from them. On the contrary, the courts, attached to tradition, accustomed to regard parental authority as a power prior to and almost higher than law, saw only the radical and serious nature of the action they were requested to take, without feeling all its necessity. Consequently, the courts showed themselves exceedingly loath to pronounce a forfeiture. For them it was like a last and unfortunate remedy from which they struggled to escape. All the reports of the Departmental inspectors of State Relief complain of this resistance, and of its discouragement to good intentions.

There also arose the question whether the courts had not been deprived, by this law which they applied so timidly, of a jurisdiction which prior decisions had always recognized in them, namely, control and supervision over parental power. We have already indicated in what this control consisted. If a father abused his authority, unjustifiably prohibited all relationship between the child and its grandparents, or by his ill-treatment endangered the child's health or education, in such case the court was accustomed to intervene, and, without divesting the father of his parental power (since it had no right to do so) authorized a continuance of the acts prohibited by the father, and even confided the child to a third person. This supervision extended over all the attributes of the parental authority. The court never went so far as to take all from the father, but, as Testoud has put it,¹ it "neutralized" those exercised to the child's detriment. In reality this jurisdiction claimed by the courts was not founded on any express legal text. Reasoning by analogy, the courts had depended upon Articles 302 and 444 of the Civil Code. The rule had in its favor the tradi-

¹ "Contrôle de la puissance paternelle par les tribunaux", in "Revue critique de législation" (1891), p. 18.

tion of the provinces of customary law and numerous declarations of purpose made in the course of the Code's preparation. And above all it appeared as the logical consequence of the principle that the parental authority is conferred upon parents, and must be exercised by them, solely in the interest of the child.

The Law of 1889 has unfortunately resulted in again throwing into doubt the correctness of this judge-made rule. It was argued that the rule was repugnant to the principle of the indivisibility of the forfeiture upon which the Law was established. Whether obligatory or optional, the effect of the forfeiture was always the same: it operated upon all the attributes of the parental authority. Now the measures which the judge formerly considered himself enabled to prescribe by virtue of his power of control, were equivalent to a partial forfeiture only. These measures were, therefore, henceforth prohibited. While this argument appeared final to some courts, others refused to renounce their right of control. The majority, however, pronounced in its favor.

The Law of 1889, then, has disappointed many hopes. In certain respects, it has even had disastrous consequences. However, without ignoring any of these causes for regret, we yet believe that the results have not been inconsiderable.

An examination of the data published during the last few years enables us to see, if not a steady progress, at least (and especially in certain localities) a fairly broad application of the law. Resistance gradually weakens, and prejudices tend to disappear. If forfeiture is always difficult to obtain and seems too radical a measure to the courts, judicial dispossession is frequently substituted, and it presents for the child equal guarantees and may be obtained far more simply. Of course, this dispossession of the parental authority presupposes that the parents have voluntarily abdicated their rights. But, when an investigation proves that they have abused it, that they are living off the child's earnings from mendicancy or prostitution, when they realize that they can no longer enjoy impunity, they ordinarily, to avoid prosecution, show themselves very ready to consent to all that is asked of them.

In this way the Law of 1889 (and this is in our opinion its greatest merit) has aroused and aided the initiative of philanthropic people. Safeguarded "against the base advantage taken of them",¹ societies devoted to the welfare of children have developed in usefulness. They have everywhere become more active and efficient. Taking the law as it is, without complaining too

¹ *Berthélemy*, "Rapport au Congrès d'assistance de Lyon de 1894", p. 14.

loudly of its inadequacy and its imperfections, they have endeavored to put it to beneficial use.

§ 48. **Legislation in Other Countries.** — It may be said with truth that abuses of parental authority are repressed to-day under all legislations. In Europe there is no country where the State has not recognized the right to intervene in protection of the maltreated or neglected child. These protective measures multiplied especially toward the end of the 1800s. From 1885 to 1899 there was scarcely a single volume of foreign legislation that did not contain some enactment upon the subject. Between these laws the differences are of secondary importance; the points of likeness are striking. This is so not merely to the extent that they are inspired by the same spirit and answer the same need, but also that there is nothing original in their authorship. Each enactment reproduces in part that of a neighboring country, and the latter was in most cases a borrowed product. It was a case of Tarde's principle of imitation, — a sort of propagation similar to that of the charters of the communes in the 1100s and 1200s.

In drawing our conclusions broadly, we would call attention only to two points. The first is, that these laws do not everywhere seem to have the same importance or the same serious character. Certain legislations (generally speaking, those least subject to the influence of the Roman Law) have, indeed, always regarded the parental power as limited. In Switzerland, Germany, and England, this power has always been subject to the permanent control of certain public authorities. They are those authorities to which the law intrusts the supervision of guardians. In England this power of control devolved upon the Lord Chancellor as representative of the King, who is himself considered as the head of every family, the "*parens patriae*." It is evident that under these conditions the forfeiture or limitation of the parental power becomes a very simple measure, to which recourse might be had without difficulty whenever justified by the child's interests. On the other hand, in countries given to regarding parental authority as a power superior to the law, forfeiture seemed a much more exceptional and radical measure. It is true that this power is no longer (as at Rome) a mere right exercised by the father in his own interests; it is now a means by which he is enabled to fulfil his duties toward his child, and that is why it has no longer any reason to exist, when those duties are neglected. But this consequence, logical as it may be, appeared, none the less, exceedingly serious. The laws, therefore, which allowed forfeiture, met

serious resistance in the countries of which we are speaking. They finally became necessary, but their enactment was slow and laborious, the last act in a long evolution.

We would next observe (and this should reassure those in France who find these reforms dangerous or at least premature), that we were not the initiators of this legislation. Other legal systems, more Roman than our own, began the work before us. The Italian Civil Code, adopted in 1865 and in force since 1866, had already taken up the problem of remedying the abuses of parental power. "If the father and mother," says Article 233, "abuse the parental authority by violating or neglecting their duties or by mismanaging the child's estate, the court, upon the petition of the nearest relative or of the public prosecutor, may name a guardian over the person or property of the child and deprive the parent in whole or in part of the rents of the property, or take any other precaution which it shall judge proper in the child's interests." Similar provisions are to be found in the Portuguese ¹ and the Spanish ² Civil Codes.

XI. STATUS OF MINORS: (3) VICIOUS AND DELINQUENT CHILDREN

§ 49. **Increase of Juvenile Crime.** — It remains to speak of a third class of children, the vicious and delinquent, who require to be punished and to be protected from themselves. The families of these children generally lack power to control them, or are even their accomplices; hence the necessity of government intervention. We shall endeavor to sketch the nature and results of this intervention.

The number of children in the class of which we are speaking had considerably increased during the 1800s and especially toward the end of that period. The social causes of the increase of juvenile crime are numerous, and yet difficult to determine. Without attempting to weigh their relative importance, we should, however, mention the movement to the cities; employment of the mother in the factory; want of supervision of the child; access to stores, tempting and facilitating the theft of goods exposed for sale. The critical age of children of the lower classes is from twelve to fifteen years. Their most habitual crimes are theft and vagabondage. From 1830 to 1880 the number of children between

¹ Art. 141.

² Art. 171.

sixteen and twenty-one years summoned before the correctional¹ and criminal courts increased from 7,104 to 28,192. In 1892 it rose to 36,735. Since then a tendency to diminish is observable; but we should not be misled by this, since it is explainable in part by the greater indulgence of the public prosecutor.

Until lately almost no attention was paid these children until after arrest. The indispensable work of prevention was hardly begun or thought of.

§ 50. **Parental Correction.** — In a certain number of cases the family itself demands the right of correction. Along with the right over the person of his child, the law recognizes in the father a right of correction.

By correction is understood the right of imprisoning the child. It is a last vestige of the parental power of the early law. It was the subject of regulation by the Parlement of Paris of March 9, 1673. The Civil Code was consciously inspired by that decree, but, in regulating the right of correction, surrounded it with new restrictions. In its detailed provisions two principles may be observed:

(1) The right of correction cannot be exercised without an order of court; the order of commitment is issued by the president of the court.

(2) This power is sometimes exercised as of right and sometimes by way of favor. It is of right when the president of the court may not refuse the warrant of arrest; it is of favor when the father may merely pray for an order of arrest, which the president of the court may refuse, if he does not find the allegations sufficient.

Correction, when of right, is admitted to reside only in the father. It belongs to him only if the child has not completed his fifteenth year. Three cases must also be mentioned in which the father may not act of right, though the child is less than sixteen years; they are when the father has remarried, when the child exercises a calling of its own, or when it has an estate of its own. When the mother exercises the parental authority, she may also cause the child to be imprisoned, but, in contrast to the father, she may never act except by way of favor, and also upon two conditions. She must not have remarried. In case of a second marriage it is the "family council" that exercises the power of correction. And, secondly, the two nearest paternal relatives of the child must join her in her action. The period of detention varies according as the order is granted of right or as a favor. It is shortest when without the protection of a court order. When the

¹ [See note to § 52, *infra*. — TRANSL.]

child is held of right, it may not exceed one month; when detained upon petition, it may cover six months. The confinement may always be shortened at the father's wish. By Article 379 the law gives him the right to reconsider his action. But the same article adds that, if after release the child again falls into misconduct, the order of detention may be renewed.

(1) *Estimate of the Law.* — It is not enough merely to understand what the right of correction is and how it is regulated by the law; we cannot escape forming our own opinion concerning it. It has long been almost impossible to base any study of this question upon facts. The few statistics published by the Department of Justice and the Department of the Interior made it possible to know at best what were the number of commitments issued each year by the presidents of the courts and the number of children under detention, though it was not always possible to determine exactly the period of the detentions. It might be said that general opinion augured ill for the measure. It was granted that it was perhaps a necessary means of repression or intimidation; but it was generally thought that detention, whether because too short, or because not properly supervised, had almost never the effect of mending the ways of the child on whom it was applied.

Two circumstances have been of unusual help to those who have been concerned with the problem, in forming a more enlightened opinion. In the first place, the "Société Générale des Prisons" in 1893 began an investigation into the actual working of the parental power of correction in France and in countries possessing a similar system. In the second place, at about the same time Beaudoin, then President of the Tribunal of the Seine, reorganized in Paris the administration of justice in the matter of parental correction. He intrusted its direction to a magistrate, Georges Bonjean, who had devoted all his life to the study of abandoned or delinquent children. In 1894 the results of the investigation were made the subject of a report to the "Société Générale des Prisons" by Henri Joly. Shortly after, Georges Bonjean made a further report upon the subject to the same Society.¹

The spirit of the Society's report differed sensibly from that of the magistrate. The practical recommendations made by each

¹ Cf. *Henri Joly*, in "Bulletin de la Société des prisons" (1894), pp. 2 *et seq.*; report by *Bonjean*, sessions, Dec. 19, 1894, *ibid.* (1895), pp. 2 *et seq.*; Mar. 20, 1895, pp. 469 *et seq.* Also *Bonjean*, "Enfants révoltés et parents coupables" (Paris, 1895). *H. Joly*, "Les abus actuels de la loi sur la correction paternelle," in "Réforme sociale" (1895), Vol. I, pp. 561 *et seq.*

were not identical, but the impression which they left was equally serious and the facts revealed were in accord. The facts demonstrated both the odious abuses to which the power of parental correction was giving rise and the ineffectualness of the practice. Instead of finding, as we should be glad to do, the instance of a family sorely afflicted, vainly struggling against the evil instincts of their child and obliged, against its own desires, and through lack of power, to turn to the law, the investigator generally found parents who had no sense of their duties and who were in a large degree responsible for the delinquencies of their children. Sometimes even the right of correction served in the parent's hands merely as an instrument of vengeance or threat, a mode of "overcoming the resistance of their children to giving themselves up to crime, prostitution, or a scandalous exploitation."

(2) *Results*. — If, now, we ask what is the result of this system, what becomes of the child placed under imprisonment, we again find the evidence always unanimous. The child leaves worse than he entered; he becomes bitter and vindictive.

That same philanthropist who had undertaken to reorganize the administration of justice in Paris in the matter of parental correction, set about remedying, so far as the law permitted, the wretched situation that was revealed to him. He first adopted a rule to make no order of commitment without hearing both the father's and the child's side, and without proceeding to a minute scrutiny into the life and morality of each.

When all the information was obtained, the magistrate considered whether the father's claim was by way of favor or of right. In the former case the order could be refused, if the complaint was not justified or if the charges alleged did not appear sufficient for so rigorous a measure. But, if it was established that the father might demand imprisonment as of right, was not the magistrate's power at an end, meritorious as the child's situation might appear? Not so completely as one might believe. The order was not refused, but deferred. In fact, as Bonjean tells us, no text of the law bound the president of the court to grant the order within a fixed period. When the parents were unfit, the record of the case was transmitted to the public prosecutor, and this might lead to a proceeding to forfeit the parental power, before the order was granted. Furthermore, as Bonjean again observed, when the father's character looked suspicious, without falling within the class where forfeiture of parental authority could be declared, another means, which was almost always successful, could be employed. The father was

found to have failed to agree in writing to pay all the costs to which the detention of the child would give rise, in accordance with Article 378 of the Civil Code. As he generally came to court with the notion that the imprisonment would mean an economy for him by relieving him of his child, he disappeared as soon as his obligation to pay the expense was made clear to him.¹

These precautions have made it possible to prevent the recurrence of most of the abuses which had been revealed and which could be committed with impunity.² Do they suffice to excuse further reform? Bonjean did not think so.³ He considers that the least reform that can suffice is the abolition of correction when demanded of right, and the extension of the child's right of appeal.⁴

Many would go farther and abolish, if they could, the parental right of correction itself. Its disappearance would leave no regret with us. The right is repugnant to our conception of parental power, since it has now been demonstrated that the child can derive no benefit from it. If it were retained, the reform of the law would not be enough; the prisons must needs be turned into reform schools, and that would be a miracle that the State could not perform.

§ 51. **Minors under the Criminal Law.**—It remains now to speak of minors who are brought into the criminal courts. The law governing the delinquent minor varies under the Penal Code according as he is over or under sixteen years of age.⁵ If over this age, he falls under the general rules of the criminal law. His responsibility is presumed; the punishment to which he is subjected is that prescribed for the acts of which he has been found guilty, and under like circumstances, might be pronounced against

¹ Although parental correction is a problem especially peculiar to Paris, we must not forget that the practice adopted by the Tribunal of the Seine is not binding upon other courts, and that it is far from being followed everywhere.

² "Bulletin de la Société des prisons" (1895), p. 8.

³ "Bulletin de la Société des prisons" (1895), p. 7.

⁴ Civil Code, Art. 382, which provides for two cases where, by exception, the father may not cause his child, under sixteen years of age, to be confined except by way of favor, adds that such child may address a complaint to the public prosecutor; the latter shall bring it to the attention of the prosecutor attached to the court of first instance, and shall make a report to the president judge of the court, who may modify or revoke the order of arrest granted by the president judge of the court of first instance.

There are in fact no cases in practice of such recourse; the child does not even know that he has the right to make the complaint. Cf. *Bonjean* in "Bulletin de la Société des prisons" (1895), pp. 26, 479.

⁵ The Law of April 12, 1906, provides that under criminal law one is of age at eighteen years.

any other criminal. On the other hand, if the minor is less than sixteen years, the case is governed by special rules. First of all, the court's attention is turned to the question of the imputability of the act; on proof of the commission of the offence, the judge, before sentence, must inquire whether the minor has acted with discernment. If this question is answered affirmatively, the child's tender age of itself constitutes an extenuating circumstance, carrying with it a mitigation of the penalty.¹ If, on the contrary, it appears to the court that the accused has acted without discernment, it must acquit him; but in doing so, it may decide, under Article 66 of the Penal Code, that instead of being restored to his parents he shall be sent to a house of correction to be educated and held there for a term fixed by the judge, not to exceed the completion of his twenty-first year.

§ 52. **Correctional Institutions.** — The care of these classes of children has been determined by the Law of August 5, 1850, governing the education and protection of juveniles subject to detention, though it cannot be said that all the provisions of this law are perfectly observed in practice. The institutions which receive them are divided into several classes:

1. Houses of arrest² and of detention for offences graded as "correctional"³ intended to receive those held upon an order of arrest demanded of right by the minor's parent; juveniles under sixteen years placed under preventive restraint; and finally (distinct from those mentioned), juveniles sentenced to a short punishment not exceeding six months.

2. Penitentiary colonies, which are essentially institutions for educating offenders within the correctional class. The children, under Article 1 of the Law of 1850, must receive, during their detention, a moral, religious, and technical education. Such colonies may be either government establishments, administered by the State, or private institutions, belonging to individuals and managed by them under the control and supervision of the prison administration. In these colonies are placed minors who have

¹ Cf. Penal Code, Arts. 67, 69.

² [The house of arrest ("maison d'arrêt") is a place of detention attached to the court of first instance of each municipality, intended for persons arrested and held for examination. Cf. Code of Criminal Examination, Art. 603. — TRANSL.]

³ [Punishments under the French Penal Code are classified into three grades: (1) "police", applied to "contraventions"; (2) "correctional", applied to the lighter crimes known as "délits"; and (3) "afflictive" or infamous, applied to the graver offences, known as "crimes." The term "correctional" is thus used as descriptive of certain crimes, punishments, penal institutions, procedure, etc. Cf. Penal Code, Arts. 1, 6-9. — TRANSL.]

been held by the court to have acted without discernment and those who have been sentenced to terms of from six months to two years.

3. Correctional colonies, where the children are sent who offer the least hope of reform; those who have been sentenced to more than two years' imprisonment; or those who, originally held in other establishments, are deemed incorrigible.

We should add that these various classifications are applicable to boys alone. Girls under age, of all classes, are held in the same penitentiary institutions. The law has been content to divide such institution into sections and establish distinct rules of treatment for each.

Children who have been sentenced or imprisoned for offences classed as "correctional" may be set at liberty before their term expires, subject to certain conditions. The prison authorities may restore them on probation to their parents or place them with a protector. But this is always considered a favor which may be withdrawn if their subsequent conduct proves it to have been unjustified. Those children whose records are most satisfactory may be authorized, after reaching the age of eighteen, to enlist as volunteers in the army.

By Article 66 of the Criminal Code, detention for minor offences could in no case be prolonged beyond the age of twenty. The time for final discharge, therefore, preceded the date of the child's majority by at least a year. The minor was then restored to his family, thus coming under a control that generally presented no guarantee and could not fail to risk a reform obtained at the price of great labor. The Law of 1850 realized the danger. By Article 19 it decided that minors who had been acquitted but held with a view to prevention, as well as those who would have received a sentence of more than six months' imprisonment, should, on discharge, be placed under the protection of the State Relief for three years at least. But this rule has not been enforced. No administrative ruling determining the mode and scope of such care was ever issued. The Law of April 12, 1906, very reasonably extended the maximum duration of imprisonment to the date of majority, that is to say to the twenty-first year.

What has perhaps most seriously compromised the operation of the Law of 1850 has been the mistrust that these houses devoted to the education of correctional offenders have inspired, and the practice in their regard followed by the majority of the courts.¹

¹ It is hard to form an opinion of these houses of correction; the scenes of violence that occur in them from time to time bring them into a sad notoriety.

In spite of the improvements in the administration of these correctional institutions, their reputation is not good. Not only time and patient effort, but also ample and decisive proof of their benefits, will be necessary to offset evil recollections and to accustom opinion to consider such institutions as genuine schools of reform and training. This explains why many courts, through mistrust of correctional detention, have almost systematically refused to apply Article 66 of the Penal Code and have preferred to pronounce short correctional sentences against minors whose cases have been brought before them. It is very certain, however, that these penalties are almost never effectual. After a few weeks or days, the prison opens, to restore the young offender to the same surroundings from which he was taken. Nothing has been accomplished towards his reform. Rather, his spirit has been wounded, and frequently he has been made even more depraved. All protective aid societies lay stress, therefore, upon the grave defects of this judicial practice. In Paris their object has been attained; the practice may be considered as definitely abandoned by the Tribunal of the Seine.

§ 53. **Preventive Measures.** — Meanwhile the need to substitute reform for penal repression has been more and more felt. By direction of the Department of Justice, the public prosecutor must send cases involving delinquent minors to a preliminary hearing. The examining magistrate must inform himself with regard to the minor and the minor's family. To procure this information, a special agent, in Paris, is placed at the court's disposal. In populous centres committees have been formed for the protection of minors who are haled before the law. These committees, advised by the public prosecutor immediately upon the arrest of a child, name a representative to watch after his interests. This representative acts as an assistant to the magistrate. He informs himself of all the facts of the case and searches for a solution that appears beneficial. In Paris, his recommendation is almost always followed.¹ These efforts have been seconded in certain measure

The investigation of 1899 was full of unpleasant significance in this respect. Important ameliorations have since been carried out, but the list of second offenders is still large, although it is not possible to state it exactly. Discipline is instilled by threat of punishment; order is kept by veteran soldiers, who are ill-prepared for the task of educators.

The number of inmates is usually too high. Cf. *Schrameck* in "Revue pénitentiaire", and "Bulletin de la Société des prisons" (May, June, 1910), pp. 562, 613, 704, 748.

¹ It may be said that the collaboration between the representatives of these defence committees and the court is preparing, or nearly realizing, the institution of special juvenile courts. In Paris, since 1906, all facts

by the Law of April 17, 1898. As its title shows, this law aims to repress acts of violence or cruelty toward children. It contains provisions intended to strengthen the preventive measures against acts of this description committed upon children, and (according to a legislative practice not unusual) the occasion was seized to insert in the law certain additional provisions which passed almost unperceived but have become the most important parts of the statute. By Articles 4 and 5, whenever a crime (whether felony or misdemeanor) is committed by a child or upon a child, the examining judge may temporarily intrust the child to the care of a relative, or some charitable person or institution, or, finally, to the State Relief.

The application of this provision may accomplish great good. It makes it possible for the child not to be detained preventively; it offers a new alternative to the discretionary action of the courts. In place of sentencing the child to a short term, or of sending it to a house of correction, or returning it to its family, the courts may leave it with a charitable institution, or the State Relief, by a very simple proceeding, lacking the serious consequences of a forfeiture of the parental power, since it merely deprives the parents of the right over the person of their child.

Unfortunately the legislator did not provide for the sure execution of these provisions. To make their application possible, the judge must obtain the assistance of philanthropic effort — of a protective aid society or a charitable institution. The examining judge may approve the measures taken for the child's keeping, but he may not impose them. Charitable societies often hesitate to assume the care of this questionable class of children; they may be harmful to other children around them, and, conscious of being under the shadow of a prosecution, they attempt to escape. Whether these children may be imposed upon the State Relief had not been decided. Certain of the departments of France

relating to minors' cases are given to specially designated judges themselves, who conduct the preliminary hearing; since 1907, all minors' actions have been brought before a single chamber. Various drafts of laws tending to the creation of juvenile courts have been proposed. That adopted by the Senate confines itself to leaving the preliminary hearing of criminal actions involving minors of less than thirteen years to a referee designated each year by the court in chambers from among the judges, former judges, barristers, notaries or solicitors (honorary or otherwise), and lastly from among the members of either sex of societies for the protection of discharged prisoners or committees of defence of children haled before the law. Cf. *Marcel Kleine*, "Les tribunaux pour enfants en France", in "Revue politique et parlementaire" (May 10, 1911), p. 240; *E. Garçon*, "Quelques observations sur le projet de loi relatif aux tribunaux d'enfants", *ibid.* (October 10, 1911), p. 63.

refused to permit it. As a general rule, the State Relief did not formally refuse, but it admitted them reluctantly. The Law of June 27, 1904, solved the difficulty by expressly including, within the scope of the aid given to minors, the care of the child whose keeping has been intrusted by the court to State Relief according to the terms of Articles 4 and 5 of the Law of April 17, 1898.

What can be done with these children? In many cases it is impossible to place them in a family. The Law of June 27, 1904, decides that children under the care of the State Relief, who, being wayward or defective, may not be intrusted to families, shall, upon a decree of the prefect and after a report by the departmental inspector, be placed in a trade school. But as a matter of fact, these schools do not yet exist;¹ and the administration of State Relief, after an unsuccessful effort, has but one resource, to secure authority from the court to confide these unmanageable children to the penitentiary administration.²

Thus, in a roundabout way, a certain number of children, falling within the jurisdiction of the State Relief, again take the road to the house of correction. Outside of the possibility of lodgment in a family, there is in France only the prison. The question of the creation of reform schools remains in the hands of congresses, commissions, and societies, who have achieved no solution. It is difficult to believe that the State can create and successfully run such institutions; nor do the results of private initiative appear more fortunate or fertile.

And yet England presents a striking example. She has organized for the bringing up of defective, delinquent, and incorrigible children a series of institutions, truant schools, industrial schools, and reform schools. Truant schools are institutions that admit truants under a strict régime, for a period that is generally short. The industrial schools receive incorrigible children, or children who have been neglected or abused, but have not received any criminal sentence. Reform schools are intended for delin-

¹ Cf. *Eugène Prévost*, "Les écoles professionnelles des enfants assistés et l'application de la loi du 27 juin 1904."

² Law, June 27, 1904, Art. 2. — Sometimes, especially in Paris, the courts, on sentencing a child to a house of correction, permit him to be provisionally intrusted to a protective or aid society. This is the system of "probation." If the child behaves well, the institution keeps him; if he is unmanageable or tries to escape, it returns him to the penal administration. The threat alone, in many cases, will be sufficient to restrain the child. A bill already voted by the Senate gives recognition to this practice of probation, the legality of which, in the present state of the law, seems doubtful. Upon the Senate bill, cf. *Garçon* in "Revue politique et parlementaire" (October 10, 1911), p. 69.

quent children or those who have been taken from the control of their families by judicial decree. To these different schools are to be added many private philanthropic works, such as that of Dr. Bernardo, who in twenty-eight years has sent to the colonies 6,571 children, of whom 6,128 have gone to Canada. Almost all these young people succeed. They are sent only after they have been physically strengthened, morally fortified, and apprenticed to a trade.

PART II

THE MOVEMENT FOR THE NATIONAL CODIFICATION OF LAW

CHAPTER V. THE INFLUENCE OF THE NAPOLEONIC CODIFICATION
IN OTHER COUNTRIES.

CHAPTER VI. THE FRENCH CODE OF 1804, THE AUSTRIAN CODE
OF 1811, THE GERMAN CODE OF 1900, AND THE SWISS CODE
OF 1907; A CONTRAST OF THEIR SPIRIT AND INFLUENCE.

CHAPTER VII. A CENTURY'S PROGRESS IN RE-SHAPING THE
LAW; THE GERMAN AND THE SWISS CODES, COMPARED
WITH THE FRENCH CODE.

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CHAPTER V

THE INFLUENCE OF THE NAPOLEONIC CODIFICATION
IN OTHER COUNTRIESBY ALEXANDER ALVAREZ ¹

§ 1. Influence upon Other Conti- tinal and Extra-Euro- pean Legislation.	§ 3. American System. Influence upon International Law.
§ 2. Influence upon the Anglo-	

§ 1. **Influence upon Other Continental and Extra-European Legislation.** — What influence did the Napoleonic Codification exercise upon the nations in existence at the period of the Code or that have sprung into being since? The question has not yet been treated, we think, with the fulness that it deserves or in its true aspects. Without assuming here to give a complete exposition of this subject, we may indicate its general lines.

Two periods are distinguishable: the one during which Napoleon imposed the Code upon conquered nations; the other, and by far the more important, during which the action of the Code was due merely to its own natural force of expansion.

(1) *Countries upon which the Code was Imposed.* — During the first period, the Code followed the fortunes of Napoleon's armies. He set it up to govern the peoples whom he conquered, without concern whether the countries where he introduced it were really ripe for the codification. But the emperor had absolute faith in the excellence of his legislative work, and his Code followed the fortunes of his arms and spread with the empire itself.

Among the countries where the Civil Code was introduced almost from its appearance we must distinguish:

(a) Those where it came into force from the date of its promulgation, having been annexed to France at the time of the peace of Amiens (1802). Such were Belgium, Luxemburg, the Palatine

¹ [This Chapter forms the conclusion (pp. 47-65) of the passage, appearing as Chapter I of the present work, taken from the same author's "*Une nouvelle conception des études juridiques et de la codification du droit civil.*" — ED.]

States, Rhenish Prussia, and Hesse Darmstadt, all of which were situated on the left bank of the Rhine; and also Geneva, Savoy, Piedmont, and the Duchies of Parma and Piacenza.

(b) Those countries made subject to the Code as a result of the Napoleonic conquests. These were Italy,¹ Holland,² the Hanseatic Cities,³ and the Grand-Duchy of Berg.⁴

(c) The countries which voluntarily adopted the French Code. Such were the Kingdom of Westphalia, on January 1, 1808; Hanover, by virtue of its union with Westphalia in 1810; the Grand-Duchies of Baden, Frankfort, and Nassau; certain Swiss Cantons; the free city of Danzig; the Grand-Duchy of Warsaw; the Illyrian Provinces; the Kingdom of Illyria from 1816; the Kingdom of Naples from January 1, 1808.⁵

The fall of the empire reacted upon the history of the countries where the Code had been imposed. Many, including the Italian States (except Naples), repudiated it; some retained it and modified it; still others preserved it in whole.⁶

(2) *Countries to which the Code Spread.* — The second period was that during which the French Code manifested its force of expansion. Like the legislation of Rome, its influence was vast.

From the moment of the adoption of the Code, the attention of the nations was attracted to the idea of codification, and it exercised a greater or less influence upon all of them. Of these we must consider (excepting always the Anglo-Saxon countries, which were frankly hostile to any idea of codification and were content with their ancient system of law) two groups of countries, in which, however, the general observations made with regard to each of them are not equally true of all the countries composing the group.

(a) The Latin group. On the appearance of the Civil Code, these found a standard by which to judge of the decrepitude of their own institutions. They accepted, therefore, as articles of faith, not only the idea of codification, but the bases and governing ideas inspiring it. These countries reproduced the articles of the Code with but slight differences.

(b) The group of Germanic and Slavic countries. These showed but tepid zeal for codification. In the first three quarters of the 1800s, they had not all adopted codes; even the few that did were

¹ Decree of March 30, 1806.

³ Senatus-Consult, Dec. 13, 1810.

² Decree of Oct. 18, 1810.

⁴ Decree of Dec. 17, 1811.

⁵ *Planiol*, "Traité élémentaire de droit civil", Vol. I, § 128; also *Glasson*, "Eléments du droit français", Vol. I, § 15.

⁶ *Planiol*, *op. cit.*, Vol. I, § 129; *Glasson*, *op. cit.*, Vol. I, § 15.

far from accepting all the principles of the Napoleonic codification. On the contrary, they drew generally upon their own traditions, giving heed, nevertheless, to the changes which their social condition had undergone. For this reason they took rather as models the codes which had been framed by peoples of the same race as themselves at a period prior or contemporary to the French Code. This was notably true of the Prussian and Austrian Codes. Now that the German Civil Code and the Swiss Civil Code¹ have come into existence, we may say that all the States of this group have been won over to codification, but without adopting as such the underlying principles or governing ideas of the French Civil Code.

(3) *Codification and the Revolutionary Principles.*—As yet no one has fully set forth the reasons why all countries did not rally to the French system of codification. As a rule it has been deemed enough to point out that codification was born of the Revolution, that it spread with the Revolutionary principles, and that it was repudiated only by jurally backward countries.

This view is by no means correct. England from the outset relentlessly opposed the principles of the Revolution, being conservative and naturally proud of her own institutions.² But her hostility to the Revolution and her conservatism are nevertheless not enough to explain why that country, which manifests her love of liberty both in her institutions and her traditions, repudiated the idea of codification.

To judge how mistaken is the idea that the countries which rejected adopt codification were inspired thereto by antipathy to the French Revolution, we need only observe that the United States has little or no codified private law, but still lives under the English common law. And yet the United States accepted the ideas of the Revolution, indeed inspired them in part, and, upon its independence, adopted an entirely new political form, quite distinct from that of England. Moreover there were countries (like Austria and certain German States) where the principles of the French Revolution had not yet penetrated even when those States did become adherents to the system of codification. The spread of codification was, therefore, independent of the destiny which befell the ideals of the Revolution. It is rather explainable by the legal history of each country and by the extent of the intellectual and

¹ [The Swiss draft was adopted Dec. 10, 1907, and went into force Jan. 1, 1912. TRANSL.]

² Sorel, "L'Europe et la Révolution française", Vol. I, pp. 355-359.

moral ascendancy exercised by France upon certain countries, especially those of Latin blood.

Let us turn, then, to the two groups of countries which did of their own volition codify their law.

The group of Latin countries accepted codification as readily as they did, because codes were not a novelty to them. There existed among them collections of laws and customs, besides the Justinian Codification. Jurists, judges, and litigants were habituated to legal texts. It was not surprising, therefore, that the simplicity, elegance, method, and logic of French codification fascinated them and that in espousing codification they also quite naturally accepted the fundamental principles and governing ideas behind it.¹

Wherever we find the detailed and codified regulation of jural institutions was reproduced (save for a few changes) by the Latin countries, it is legal history that offers an explanation. Had not the principal institutions of the law received nearly the same development in all these countries? The regulations embodied in the French Code were consequently found to satisfy very easily the needs of the Latin countries, and consequently also the presence

¹ The Latin-American Republics have since independence felt the need of codes distinct from that of their mother country. One of the best and at the same time one of the oldest (promulgated 1855, in force 1858) is the Chilean Code. Like all the codes of the Latin countries it follows very closely the French Code. It has drawn, however, from the various laws in force in Europe and America whether codified or not, and even from English and American law. Notably, in private international law, the theory of territoriality, — which is that of the two last-named countries, — was preferred to the French theory of nationality. The preparatory drafts, which indicate their origin in the margin of each Article, prove this diversity of inspiration. The Chilean Code contains, besides, certain original institutions which we find again elsewhere in later codes. The reason why Chile possessed so eclectic and advanced a code for the period is that (like all Latin-American countries) she was born to political life in a day, and her legal institutions were without deep root in the past. Consequently the Chilean Code has served as a model for almost all the codes of Latin-America, some of which have even reproduced it almost word for word.

Among the institutions, embodied in it, which were new in 1855, may be mentioned:

a. The duty imposed upon courts of justice to render an annual report in March to the President of the Republic upon the difficulties of interpretation or upon the deficiencies noted (Art. 5). Although this provision has unfortunately not been observed, it was proof of the desire of the authors of the Code not to crystallize the law, but to keep it constantly abreast of practical needs, and to associate in this wise labor both judge and legislator.

b. Precision of the rules of interpretation governing judges, depriving them (wrongfully in our opinion) of all discretion in this respect.

c. Introduction of very complete rules of private international law, adopting the theory of territoriality.

d. Assimilation of the Chilean and the foreigner with regard to civil rights.

of the Civil Code caused the antiquated character of the institutions of these countries to be the more apparent; so that they set themselves to the task of codification, taking the French Code as their guide.

The intellectual and moral ascendancy of France also operated effectively towards the same end. We have already noted that private law alone was codified in France, administrative law having as yet no tradition. Now, by the time the Latin countries undertook their task of codification, they already possessed a formal administrative law. Nevertheless, like France, they codified only their private law. If they did not do likewise for their administrative law, it was largely because they had no French Code to guide them in the matter.

The Germanic and Slavic countries, constituting our second group, had other reasons for not taking up codification. Codification came about ultimately in spite of the strength of the historical school, which, as we know, grew out of a reaction against a demand for codification, and impeded the work of unifying German law.¹

e. Granting of legal personality to civil partnerships and the right of other associations, when recognized as lawful, to obtain legal personality by governmental concession.

f. Recognition of legal personality in every one born alive, though continuance of life is impossible.

g. Fixing majority at twenty-five years, a person of twenty-one years being permitted to acquire an almost complete capacity through habilitation by age.

h. The almost complete assimilation of the rights of the legitimate and illegitimate child.

i. Publicity as to land transfers and rights "in rem" by the creation of a recording system.

j. Limitation of the right of inheritance to relations of the sixth degree; granting the right of inheritance to the surviving consort, immediately in line after legitimate descendants and "pari passu" with the nearest legitimate ancestors and natural children.

k. The "mejora" or "enlarged reserve", amounting to one-fourth of the estate of the decedent and added to the reserve, distributable by the will of the testator only in favor of his legal descendants.

l. Annuity for maintenance, reserved by law to the surviving and needy consort.

m. Adoption of the French "legal community" as the common law property rule of matrimonial estates, combined with that of community of acquests; the necessity laid upon the husband of receiving the consent of his wife and the confirmation of a court to alienate lawfully immovables from his separate estate. The consequent suppression of contractual marital arrangements, that provided by law sufficing.

n. Abandonment of the lien created by law in favor of the wife over the property of the husband to secure the restitution of her marriage portion, and the unity of régimes governing her marriage portion and her separate estate.

o. Exclusion of the "beneficium competentiae" (or exemption of a subsistence) to co-partners, relations and "bona fide" debtors.

¹ Upon the different codes prior to that of 1900 in the various German States, and the attempts at codification which preceded it, as well as the

But when codification did come, these countries did not follow the principles and institutions of the French Code, because they already possessed their own institutions, which their history had stamped with a character of their own. Being different from the corresponding institutions of France, they required to be differently regulated. Historical law was, therefore, taken into consideration by their Codes, and it was adapted to the new conditions of their social life. Nevertheless, the French Code, by rejuvenating the institutions which it regulated, had rendered them more like those of these countries, so that it became possible for them to borrow from it certain principles here and there.¹ And finally, though a few Germanic and Slavic countries did adopt the French Code in its entirety, it was because they had no truly national legal history.

§ 2. **Influence upon the Anglo-American System.** — We have noted above that though Anglo-Saxon countries repudiated codification, it was not because of their hostility to the ideas of the Revolution. Recognition of the traditionalism of the English character does not, moreover, suffice to explain this, for the question is precisely to discover the reason that led the English to prefer their system of customary law. Quite contrary to what is sometimes asserted, they are in no wise believers in any absolute excellence of their system; they very clearly recognize its disadvantages and have tried more than once to remedy them by recourse to codification.

The truth is that, since codification had found no prior place in their history, the English were not fascinated by the idea and could criticize it freely. They reached this conclusion: codification, upon the postulates of the French Code, possesses as many disadvantages as their own legal system; it would be necessary to construct upon other bases, and those would offer well-nigh insurmountable difficulties of execution.

Only after understanding the postulates upon which English law rests and its precise function, can we compare the English system with that of countries of codification and pronounce upon their relative merits. If we turn to the sources of English law, we find that the philosophical doctrines of the 1700s, which had

preparatory work of drafting, *cf. Saleilles*, "Introduction à l'étude du droit civil allemand", §§ II and III.

¹ The influence of French law upon German law also manifested itself in the administrative field, where certain institutions were modelled upon those of France, and where others, by reason of the source of their inspiration, became analogous to those of French law. *Cf. Mayer*, "Le droit administratif allemand" (French ed., 1903), Vol. I, p. 14.

such great success in France and so dominating an influence upon the law of that country, enjoyed no credit in England, which was, nevertheless, their country of origin. This philosophy, which aimed to destroy all in order to remake all, came and went.¹ Consequently, not only was no contempt felt for the ancient sources of law, particularly custom, but in fact from such sources still flow the public and private law of England. In the field of public law we find that the Constitution has not been wholly set down in writing, but remains customary; the basis of private law is the common law, or the ancient general custom, along with equity, the precise origin and development of which has given rise to much controversy.

The distinctive source of their law is in reality the decided case; for the magistrate alone has full power to determine the existence of the rules of common law and equity. So soon as a case is decided, it constitutes a precedent, serving as proof of a rule of law and fixing it. Whenever an analogous case presents itself, the judge is bound to conform to the prior decisions which evidence the existence of the common law or equity rule.

English law is, therefore, in reality less a body of custom than a collection of cases. The judges appear to have only a restricted function; but that is by no means the fact, as we shall presently see.

The decided case is the principal source of their law; but it is not the sole source. Alongside of it is statutory law, which covers only special subjects where the common law has been deemed too antiquated. Legislation therefore merely supplements the common law. When the legislator intervenes, his work, inspired solely by practical requirements, possesses none of those traits attaching to it in countries of codification. The English have a correct appreciation of man's inability to make time and space subservient to legal texts. They, therefore, systematically avoid enacting laws of a general character or such as regulate an entire subject in a final way. Legislative rules are limited to determinate groups of facts. Laws are passed upon specified points; the statutes are later generalized or reformed, and this is what gives to English laws their specific character. Not only do they avoid embracing entire groups of matters, but their provisions are not inspired by that excessive spirit of logic which is the striking feature of the law of countries of codification. The English law-maker does not inquire whether the law he is drafting is in har-

¹ *Taine*, "Origines de la France contemporaine. L'ancien régime", bk. IV, chap. I.

mony with the bulk of the law of his country; he does not try to strengthen his law by bringing it under the authority of some general principle, from which his work may appear as a simple logical deduction. The English Parliament adopts without embarrassment some one corollary of a general truth, while feeling free to reject others in spite of the demands of logic, which require that all possible consequences be drawn from an admitted truth. Nor does it claim to pronounce final laws, not unalterable in the future. On the contrary, it often passes temporary or local laws, applicable for a given period or within a limited region; the latter are called local acts. Certain laws are optional in their operation, that is, one is free to place oneself subject to them or not. Other laws are put forth as experimental.¹

Since legislation is considered as having but a temporary character, it does not inspire in jurist, judge, or litigant the same superstitious respect as in the countries of codification. Consequently, though in pure theory all laws are equally obligatory, the moral authority of a statute is taken into consideration by the legislator and judge. An unsatisfactory law is often twisted or violated; the legislator does not dream of protesting. Rather than stiffen the law's penalty, he seeks the causes of the opposition which the law has met and remedies them. For it is not enough for him that a statute is of itself sound; he desires further that its results be good and that it should not clash with lawful interests. The judge, in turn, sanctions practices by which a bad law is evaded or rendered inapplicable. In this way many laws have fallen into disuse. Not only do English courts regard infractions by the public of bad laws as justifiable, but they even do not hesitate to criticize certain laws from the bench in the very presence of litigants.²

English laws, drafted, as we thus appreciate, to answer practical needs, have in this respect a character quite different from that of the laws of the countries of codification. Contrary to what has taken place there, English private law is not imprisoned within precise formulæ; it does not constitute a systematic whole, since it is not as elsewhere the exclusive work of legislation. It is not always easy, indeed, to know exactly what the law is. But for this very reason it remains attached to that social environment to which its rules apply. However great the respect of the judge

¹ Upon the character of English statutes, *cf. Boutmy*, "Essai d'une psychologie politique du peuple anglais au XIX^e siècle", pp. 238 *et seq.*

² *Id.*, pp. 254-259.

for decided cases, the law develops in harmony with the needs of the sphere where it operates. In this way the law insensibly makes place for the new jural relationships resulting from social evolution. It is, therefore, never in conflict with justice. It is not inspired by fixed principles, as is the private law of countries of codification, where the legislator regulates all legal relations, but rather by social interest and equity. It is not possible, therefore, to abstract the essence of English law, as we have done for French law, by summarizing its institutions; the body of the English law refuses to be formulated with precision.

Thus, when the question of codification presented itself to their minds, the English conceived it very differently from the French legislator and those who have been inspired by his work. While not losing sight of the nature and history of their law, they did not look upon codification as a body of precepts drawn up by the legislator with an idea of innovation. In their eyes codification was a sort of general balance sheet, summarizing and simplifying all prior legislation. Out of fear of committing errors in so delicate a matter, either by adding dangerous rules or by omitting essential ones, they came to consider codification as a task well-nigh impossible. Hence they never went farther than to consolidate certain special laws bearing on specified matters, notably commercial or administrative law. The civil law as a whole has remained outside the efforts at codification.¹

The English were no more favorable to codification when it took the form, not of international law, but of international conventions. Several conferences have met for the purpose of codifying international private law, at least along general lines. In 1881 England was invited to one of these conferences; but its government declared with great definiteness that in its belief no international agreement was possible except upon certain specified matters.² When a new conference was called in 1893, England refused to take part, alleging as her reason the specialized nature of her law.³

English opposition to codification is not absolute, however. In her colonies, where no historical body of law existed, certain codes have been promulgated. Thus, beginning with 1860, India and certain other colonies received from England a series of codes regulating almost all branches of law, and even certain parts of the civil law were codified in India between 1865 and 1872.

¹ For English efforts toward codification, *id.*, pp. 249-251.

² "Journal de droit international privé" (1886), p. 45.

³ Renault, "Les conventions de La Haye (1896-1902) sur le droit international privé", p. 19.

§ 3. **Influence upon International Law.** — Strange as it may seem, the Napoleonic codification of the civil law exercised a notable influence upon the attitude towards international relationships, that is, upon the rules of international law. It rooted in the countries of codification the idea that there existed precise and permanent rules between States which should govern their intercourse. The entire literature of international law of these countries was occupied with explaining the international rules, which it regarded as borrowed from various sources of law, including custom. It did not perceive that it was in reality giving a place of preëminence to rational speculation and the principles dominating the civil law. Proof of this lies in the fact that most of these authors arranged the material as in the system of civil law. They even attempted to subject certain international relations, such as agreements and prescription, to rules borrowed exclusively from the civil law.

Such a method was bound to have logical consequences, and they soon manifested themselves. When sundry States, acting from quite justifiable motives, refused to observe these supposedly fixed rules, and followed others, the international jurists, confronted with these new departures from their own bookish systems, never thought to raise a doubt whether the rules of international law (in fact more variable even than those of any other law), were after all susceptible of precise formulation. They made no search for motives of general policy in the conduct of States. They were content to censure these governments for having infringed the "rules" of international law.¹

Such, for example, was their attitude towards the various measures employed in the development of imperialism, whose many manifestations (hegemony, "de facto" occupation, protectorate, hinterland, so-called peaceful intervention, grant of administrative powers, long term lease with rights of sovereignty) were condemned by the writers of the countries of codification in the name of national independence and sovereignty. And yet these manifestations were in reality, in international law, the starting point for a renaissance which has become necessary by reason of the economic transformations of civilized society.

¹ We should make exception in favor of the instruction in international law and the "jus gentium" by Renault and Dupuis in the "École des Sciences Politiques." Cf. Dupuis, "Le droit de la guerre maritime d'après les doctrines anglaises contemporaines" (Paris, 1889). We should also mention the notes by Fauchille, in *Bonfils*, "Manuel de droit international public."

The truth is, international law was expounded according to a thoroughly unsound method. Except with regard to treaties, which are continually expanding their scope, international law was not only customary in origin and development, but always inspired by the political situation of the moment. Consequently its rules were constantly modified, and were modelled upon the variable needs of the international relations of the civilized world. These relations were not, therefore, governed, as was too often believed, by abstract and uniform principles. On the contrary, it was from the particular policy of each State that the rules of international law were to be drawn, — a policy varying according to the level of civilization to which the different countries might have attained or according to the special situation in which they might for the moment find themselves. It was this last circumstance which gave birth to an American international law.¹

International law must, therefore, be expounded with reference to the facts of diplomatic history and of contemporary politics. The former investigates the continuous changes going on in international relations and explains their motives; the latter determines the rules which momentarily govern them and the more or less profound modifications which these rules have undergone or will undergo in the future. Once these bases are laid for the study of

¹ The general reasons for an American international law may here be pointed out: The Monroe Doctrine proposed to make and did make the Latin-American Continent independent and distinct from the Old World. It opposed the idea that the civilization of the New World was to be a mere reproduction of the Old, as is the case to-day in that newest of New Worlds, Oceania. The fact that the New World was suddenly cut away from the Old, following the revolution which won for it its independence and placed in its possession vast expanses of almost uninhabited territory, explains all the great problems of internal and external policy of the American countries: civil wars of various kinds, political isolation of the countries, quarrels arising out of the delimitation of frontiers, and above all, the two most serious problems of the present hour: the need of attracting European immigration with its consequences, and the hegemony of the United States of America. These conditions gave rise to as many questions, which in so far as peculiar to America, originated what we term American International Law. The basis of this law rests, therefore, upon a three-fold fact not found in Europe: An absence of treaties of alliance tending to establish a balance of power among each other or with Europe; a need to increase the population by immigration; and North American hegemony.

It is certain that if Latin-America had received after independence a powerful stream of foreign immigration, above all English, her States would form to-day a confederation larger and more powerful than North America; by that fact the European balance would have been broken and the world problem of to-day, the far-eastern question, which interests at once Europe, Asia, America, and Oceania, would already have been solved. [See on this subject the distinguished author's later and more elaborate exposition in his essay on "Latin-America and International Law" ("American Journal of International Law", III, 269). — Ed.]

international law, we shall abandon the errors and deceptions inevitable in a theory which conceives of that law as a body of fixed and definite rules, even though the rules have in fact never been certain, or have fallen into disuse or, indeed, have never existed save in the minds of the authors.

And so, among the far-reaching influences of the Napoleonic codification, with its conception of law as consisting of a comprehensive and immutable body of definite and fixed rules, we must not fail to include this attitude which has dominated in the international law of the nineteenth century.

CHAPTER VI

THE FRENCH CODE OF 1804, THE AUSTRIAN CODE OF 1811, THE GERMAN CODE OF 1900, AND THE SWISS CODE OF 1907; A CONTRAST OF THEIR SPIRIT AND INFLUENCE

BY IVAN PERICH¹

Introduction

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| <p>§ 1. Roman Law and Modern Codes as Instruments of Unification.</p> <p>§ 2. The French Civil Code of 1804.</p> <p style="padding-left: 20px;">(1) Outside of Germany.</p> <p style="padding-left: 20px;">(2) In Germany. (3) International Significance of the French Code.</p> <p>§ 3. The Austrian Civil Code of 1811.</p> | <p>§ 4. The German Civil Code of 1900.</p> <p style="padding-left: 20px;">(1) The German Civil Code in France. (2) Distinguishing Principles of the German Code. (3) The Judicial Function under the German, Swiss and French Codes.</p> <p>§ 5. The Swiss Civil Code of 1907.</p> |
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Introduction. — One fact is certain and indisputable: the reciprocal influence of nations. This fact is highly conducive to that equality of nations with respect to social conditions, so essential to the development of the spirit of human solidarity. We have here a phenomenon similar to that of the physical world, when media of different temperatures, coming into contact, produce a single medium of uniform temperature. No doubt the influence of one nation upon others, or vice versa, does not always act with the same intensity. The action of a more civilized nation upon a less is stronger than the latter's influence upon the former. The

¹ [Professor of Law in the Royal University at Belgrade, Serbia; Corresponding member of the "Institut du droit comparé."]

This essay appeared in the "Revue de l'Institut de droit comparé" (Brussels), Vol. III, pp. 58-88 (1910).

Among other works of this author may be mentioned: "La condition juridique des bosniaques et des herzégoviniens", etc.; "Influence de l'unité de la législation civile sur le développement de la solidarité parmi les hommes" (Rome, 1910; a memoir presented to the First Congress of the European Federation, at Rome, in 1909); and a French edition (1903) of the Serbian Constitution. His remaining works are chiefly in the Serbian language. — ED.]

explanation is very simple: of two forces, the greater is more far-reaching and perceptible than the lesser.¹

It is useful, and we should rejoice, that forces are also at work in social phenomena favorable to the progress of the spirit of solidarity. For, were all nations of equal force — using that word in its larger sense — though having different social institutions, their reciprocal influence would be a minimum. The result would be an indefinite continuation of the diversity of institutions, a condition prejudicial to human solidarity. But if, among several nations, there is one which dominates the others morally and intellectually, its influence will be very strong and will tend, moreover, toward one result: to cause the servient nations to adopt the ideas of the dominant nation. The important goal is to secure equality of social conditions in the different States, in order to render human solidarity possible, let the course be what it may.

But it is rare, especially in modern times, for one people to be so superior to others that it feels no influence from them. Generally the influence between nations is reciprocal, so that a state of culture is finally created, intermediate between the two.² The principle of “The Declaration of the Rights of Man and of the

¹ By force should not be understood mere physical force, but also moral and intellectual force. It is natural for men to conform their ways to those of persons stronger than themselves. They are not to be blamed; to do so would be as senseless as to reproach the earth for revolving about the sun. Force is attraction, influence, and command, and to require that men emancipate themselves from force, would be to desire the principle of force to disappear from social phenomena. That would be to demand the impossible.

Moreover, physical force is always said to transcend the two other kinds of force, moral and intellectual; and this is held regrettable. The observation is not just, for the operation of a force depends, not upon its intrinsic character, but upon its intensity. If physical force happens to transcend moral or intellectual force, it is not that physical force is inherently superior to the two other forces, but that, in a given case, the physical force is more intense than the moral or intellectual force. It follows that it may happen, and, in fact, often does happen, that moral and intellectual forces overcome physical force. Was it not true, for example, that Napoleon, returning from Elba, was, from the material point of view, infinitely weaker than the army sent against him by Louis XVIII? We must certainly admit it; and yet it did not prevent Napoleon from overthrowing this physical force. By reason of the moral force which he exercised over the army of the king, Napoleon witnessed its defection to him and its march upon Paris. Cf. *E. Maréchal*, “Histoire contemporaine de 1789 à nos jours”, Vol. I, p. 345.

² We may compare this phenomenon to the example referred to above of the two media of different temperatures which, coming into contact, finally reach a common temperature. And just as in this example, the degree of the resultant temperature will be closest to the degree of the medium having the highest temperature, so the intermediate state of culture which we have just mentioned, will approach closer to the state of culture of the more civilized than of the less civilized nations.

Citizen", that all persons are born equal, is certainly fundamentally wrong so far as nations are concerned. In other words, we know that nations are not born equal. Perhaps, due to the tendency of social evolution to bring nations to the same level, they will become equal. But at their birth they differ among each other — if we may be permitted the comparison — as the linen of the humbly born babe from that of the richly born.

§ 1. **Roman Law and Modern Codes as Instruments of Unification.** — To the Roman law, it may be said, we owe the greatest debt for the unification of civil legislation, in so far, of course, as unification has been realized to-day. No body of private law has exercised so profound an influence upon the world. This is not astonishing if we recall what was said above regarding the moral and intellectual influence of nations upon one another. The difference between the state of culture of the Romans and of the other nations was too great for the influence of the former not to be felt with great force.

Thus, in the first place, Roman law expanded into the provinces of southern France, known as the "regions of written law." But the northern provinces of France did not escape its influence, though customary law dominated there. Consequently, it was very natural that the French Civil Code (1804) was not untouched by Roman law. Indeed, the Code has been very correctly called ¹ a mere "compromise between customary and written law."²

Roman influence has been especially perceptible in German law. This seems strange if we look only at the racial difference between the Romans and Germans. But it is explainable upon political grounds. After the fall of the Roman Empire and the division of Charlemagne's empire by the Treaty of Verdun in the year 843,³ the German Emperors, from Otto I, the Great, assumed the title of

¹ *Albert Sorel*, "Livre du centenaire du Code civil" (Paris, 1904), Vol. I, Introduction.

² By a "compromise" we must be understood to mean that the different legal institutions which found a place in the French Code were borrowed, some from the customary law, some from the written law (Roman law), and not that a compromise took place in any single juridical institution. In the latter sense compromise must have been impossible. For example, how reconcile the Roman rule that failure to execute an agreement does not give to the injured party the right to rescind unless an express clause has given the right ("lex commissoria"), with the rule of French customary law which guarantees to each contracting party the right to annul the contract when the other party fails to execute his obligation? The French codifiers of 1804, then, did not have to face a compromise in this sense, but simply an election between the two systems. We know that it was the customary law which the Civil Code, Art. 1184, adopted in this particular case.

³ Cf. *Duruy*, "Histoire de France", Vol. I, p. 205.

Roman Emperors, and their State that of the Holy Roman Empire of the German Nation, so that politically Germany was but a continuation of the true Roman Empire. The consequence was the introduction of Roman law into the Germanic countries,¹ that is, the countries of present-day Germany and also of Austria. We may thus easily understand the difference between the French Civil Code on the one hand, and the German law (prior to the codification of 1896) and the Austrian Civil Code on the other. The first adopted Roman law only partly; the last two legislations were, in principle, nothing but modernized Roman law. Modern Roman law ("Pandektenrecht"), or the German "common law" before the introduction of the Civil Code, constituted in that country, in the 1800s, almost the only subject of study in private law,—a study, however, that did the highest credit to German legal science. The codification of 1896 put an end to these labors by giving them a new basis, the German Civil Code ("Bürgerliches Recht für das Deutsche Reich"). It hardly need be added that this Code, though not a compilation of Roman law, bears a deep impress of it; the difference between French and German law, which we noted above, has not disappeared since this codification. As to the Austrian Civil Code, which went into operation at a time (1811) when Roman law alone met all the needs of private legal relations, it is even more than the German Code saturated with Roman law.

But the influence of Roman law was not limited to the west or center, it also made itself felt in eastern Europe. The compilation of the Emperor Justinian must certainly have exercised an attraction upon the governments and the cultured minds of the Eastern Roman Empire. This observation is especially important in relation to the Serbian and Bulgarian States, which in the 1100s, 1200s, and 1300s had attained great power and prosperity.²

¹ This introduction had been especially marked with respect to the "general part" of private law ("Der allgemeine Teil" of the Civil Code of 1896) and the law of obligations ("Die Schuldverhältnisse", of the same Code); "because its introduction", said *E. Heilfron* ("Deutsche Reichsgeschichte", § 453) "was notably facilitated by the incompleteness of German juridical development in this field."

² To form a correct idea of the influence which the Byzantine law, *i.e.* the Roman law, exercised upon the legislation of old Serbia, we should read the highly instructive introduction by *Stoyan Novakovich*, President of the Serbian Academy of Sciences, to his "Code of the Serbian Emperor Stefan Dushan" (1905 ed.). The Emperor Dushan reigned in Serbia from 1331 to 1355 and Serbia was then the most powerful country of southeastern Europe. Its Code, justly celebrated both for its substance and for the fact that at that period it was practically the only codification in all Europe, was, during the 1800s, the object of numerous studies on the part of Russian, Polish, Czech, Croatian, Bulgarian, and Serbian scholars.

This influence of the Roman law upon a greater part of Europe has powerfully contributed to the establishment throughout of similar juridical principles. This result would certainly not have been obtained, had the law of the European States been from the beginning subjected to different influences.

We must, however, here note the great difference between the present states of property law and family law, as compared to Roman law. Whereas, aside from the innovations natural to a progressing humanity, the law of property is to-day substantially what it was in the time of the Romans, it is not so with family law. The Roman and the modern family have diverged upon more than one important point.¹ The reason is that the constitution of the family is intimately related to the political organization of the State, and that this has undergone very many changes since Roman times.

If we inquire into the cause of this fact, it is found to be that the laws affecting political organization are less close to the material relations of life than the private law of property (patrimony). Consequently the former represent relations in which physical laws (*i.e.* natural) have not so strong a hold as in property law, which, regulating the material relations of men, feels the action of these same physical laws to a greater degree. It follows that the human mind, which, concurrently with physical law, plays a rôle of intermediary or agent in juridical phenomena in general, gains a freer stride when the problem is one of political law than when it is of private law: the former is characterized by greater abstraction, greater intellectual liberty toward the material elements of life than the latter. Now, intellectual action is far more liable to change than physical law, and that is why the evolution of private law is slower than that of public law.

The principal characteristic of Roman law, a characteristic which has served to unite the civil law of the different peoples which have fallen under its influence, is certainly the institution of private ownership. This principle brought with it, at first among the Romans, later among their successors, the free rivalry of human action, — the principle to-day called "individualism." These two principles, especially the first, wrought a breach in feudalism and its land system, which was the denial of the free circulation of land (ownership) and of the liberty of the individual (individualism). The feudal period replaced the Roman period, but it was not long

¹ Cf. *Emile Stocquart*, "Aperçu de l'évolution juridique du mariage", Vol. II, pp. 48, 49, 140.

in disappearing in its turn, because of Roman private law, among other things, and its diffusion through Europe.¹

The tendency toward unification, begun upon so vast a scale by the Roman law, has increased in modern times by reason of the codifications undertaken successively by several European States. Had these codifications no other result than to hasten the work of unifying the civil law, that would suffice to make us pronounce in their favor. It is surely no mean result to spread and strengthen the sense of solidarity among men, a solidarity which can but gain through the unification of civil legislation.

Our purpose does not permit us to enter into the debate upon codification. We shall limit ourself to the statement that without codification, that is, without written and precise laws, commanded by the sovereign power, there would be no legal control of life within a State, and consequently neither order nor peace. And once the necessity of codification is recognized, the soundness is also recognized of the doctrine that the legislator does and must proceed in a rationalistic manner.

For, even admitting that the law emanates from the mass of the people by slow evolution — an admission which is far from being absolutely correct — nevertheless the function of the codifier would be very important. His task would be to raise an orderly structure from all the materials which the popular mass places at his disposal. The law-maker would, therefore, be an architect, and the architect is a creator as well. But more than this, the draft of a code can and should go beyond the relations which he finds already established between individuals. Aided by reason, the legislator may go beyond his period, completing the legislative work of the people, and, let us repeat, creating norms rationally. It would indeed be strange were it otherwise. How, in fact, is it possible to believe that law, which is something abstract or intellectual, can be created unconsciously by the mass of the inhabitants of a nation and not also by the conscious reason of the legislator? On the contrary, the latter must be the principal source of law.²

¹ Byzantium, which was subjected to the direct influence of the Roman law, never developed feudalism. Cf. *Novakovich*, "The Code of the Serbian Emperor Dushan", p. 31 (written in Serbian).

² Cf. on codification: *Salvilles*, "Introduction à l'étude du droit civil allemand", in which is described the celebrated scientific dispute between the dogmatic school of Thibaut, who approved codification, and the historical school of Savigny, who disapproved it. Also cf. *Gény*, "Méthode d'interprétation et sources en droit privé positif", and preface by *Salvilles*; *Larnaudie*, in "Livre du centenaire du Code civil", chapter on "Le Code civil et la nécessité de sa revision", p. 901; *Eustache Pilon*, "Réforme du

But let us return to the question of the influence of the several codifications upon legislative uniformity. It is certain that the law of a country exercises greater influence upon other countries if it is codified. The code becomes, as it were, a beacon, projecting its rays afar, whereas a body of law that is scattered, disseminated, and uncoded, can never possess such influence. French law did not encircle the earth until it had been codified. The same is true of German law. In its common law form, as it existed prior to codification, it could in no wise be compared to French law, from the point of view of the importance attached to it by other nations. And we must add that, to enjoy the widest influence, a new code must be that of a nation, not only of culture, but efficient and powerful. For the world copies a certain few examples, and for an example to be followed, it must be in evidence; and only the great nations are so placed. It follows that no matter how perfect the code of a small State may be, it can never spread abroad as generally as the code of a powerful State. We see, then, how important it is for such a code to be a work of excellence. There is danger, indeed, lest great States, which so often become examples, give to the world types of reactionary or mistaken legislation.

§ 2. **The French Civil Code.** — The influence of the French Civil Code was considerable.¹

(1) *Outside of Germany.* — Some countries adopted the French Civil Code in its entirety.

Such is Belgium. In 1814 that country was separated from France and reunited to Holland. The French Civil Code (called the Napoleonic Code after September 3, 1807) came into force there from May 1, 1809, by a Decree of Louis Bonaparte, issued February 24 of the same year by order of the Emperor,² and became the common statute of the new realm. It remained so up to the time when the Revolution of September, 1830, rendered Belgium independent.³ After that Revolution, Belgium continued in force

Code civil par voie de revision générale", *ibid.*, p. 935; *Planio*, "Inutilité d'une revision générale du Code civil", *ibid.*, p. 955; *Saleilles*, "Le Code civil et la méthode historique", *ibid.*, p. 55.

¹ To be convinced of this we need but read "Livres du centenaire du Code civil", Part III, "Le Code civil à l'étranger", pp. 587 *et seq.*, containing studies by *Carl Crome*, *J. Kohler*, *E. Müller*, *J. Van Bieveliet*, *Hanssens*, *P. B. Mignault*, *Pierre Arminjon*, *C. P. Chironi*, *Gorai*, *P. Ruppert*, *Rolland*, *C. D. Asser*, *C. G. Disscous*, *Alfred Martin*.

² Cf. His letter to Louis Bonaparte, October 31, 1807, "Correspondance", Vol. XVI, p. 155.

³ *Hanssens*, in "Livres du centenaire du Code civil", chapter on "Le Code civil en Belgique", p. 681.

the Napoleonic Code,¹ while Holland enacted on October 1, 1838, a new body of civil law.² Of course the French Civil Code was not afterwards without influence upon Dutch law itself.³

Roumania came next. Its present Civil Code was promulgated December 4, 1864,⁴ and came into operation December 1, 1865. Although the royal decree of July 11, 1864, commanded that the French Civil Code be used as a model in the work of codification, "it would nevertheless be a grave mistake to suppose that the Roumanian Civil Code is a servile translation of the French Civil Code."⁵

The Civil Code of Spain of 1889 was to an equal degree drafted under the influence of the French Civil Code.⁶ The latter is still the law in the Grand Duchy of Luxembourg, though very numerous modifications have been introduced.⁷ As to the Code of Monaco, it has been said: "In spite of the long work of preparation, the new Code remained, for the most part, a textual reproduction of the Code of 1804."⁸

Italy, linked to France by so many ties of race and history, especially felt the influence of the French Civil Code. The Code now in force was promulgated in Florence June 25, 1865, and came into operation from January 1, 1866 (in Venetia in 1872). "Compared with the Code of King Albert," says Planiol, "the Code of 1865 is a marked return towards our own," *i.e.* towards the French Code.⁹

The French Civil Code continues to be the foundation of the law of the Swiss Canton of Geneva, according to Alfred Martin, from whom we learn also the influence of the French Civil Code

¹ Art. 139, Belgian Constitution; *cf.* Dareste, "Les constitutions modernes", Vol. I, p. 75.

² *Hanssens*, in "Livre du centenaire, etc.", chapter on "Le Code civil en Belgique", p. 682.

³ *Asser, ibid.*, "Le Code civil dans les Pays-Bas", p. 817.

⁴ *Planiol*, "Traité élémentaire du droit civil", Vol. I, p. 53.

⁵ *Dissescu*, "Livre du centenaire, etc.", chapter on "L'Influence du Code civil français en Roumanie", p. 856. The author continues: "A large number of provisions were modified or suppressed; a few original ones, taken from the early law, were introduced. Especially with regard to liens and hypothecs, we preferred to follow the Belgian law of 1851; this has often given rise to conflicts and inconsistencies."

⁶ Published in the "Gaceta" of July 25 to 27; *cf.* *Planiol*, "Traité élémentaire de droit civil", Vol. I, p. 51.

⁷ For these *cf.* *Ruppert*, "Livre du centenaire, etc.", chapter on "Modifications apportées au Code civil dans le Grand-Duché de Luxembourg (1807-1904)", p. 793.

⁸ *Rolland, ibid.*, "Le Code civil de 1804 dans la Principauté de Monaco", p. 807.

⁹ *Planiol*, "Traité élémentaire de droit civil", Vol. I, p. 52; French trans. of Italian Civil Code, *Orsini* (Paris, 1866), and *Gandolfi* (Annecy, 1868).

upon the other Cantons of the Romanized districts of Switzerland.¹

There is yet another country over which the Napoleonic Code has also exercised a certain influence, Serbia. This country received no attention in the "*Livre du centenaire du Code civil*", apparently because the influence was unknown. The Serbian Civil Code — if we may be permitted to turn to it a moment — was promulgated in 1844, and is, in principle, a translation, though abridged, of the Austrian Civil Code of 1811. But in the following years its first form underwent important changes. Of these the more important are those of May 5, 1864, in the reign of Prince Michael Obrenovitch, who had surrounded himself by men who had pursued their studies in France. These modifications come for the most part from the French Civil Code. We may cite as examples: Art. 303a, upon the "*Actio Pauliana*"; Art. 565, upon the revocation of gifts "*inter vivos*", made to the detriment of creditors whose claims are evidenced by writing, or of heirs of the undisposable portion of an inheritance ("*réserve*"), or of the widow; Arts. 601a, 602a, 603, 604, and 604a, upon loans at interest; Arts. 928a, 928b, 928c, 928d, 928e, 928f, 938g, upon extinctive prescription, etc. The same is true of Art. 130, modified May 7, 1868, adopting the rule prohibiting inquiry into the paternity of illegitimate children.

(2) *In Germany.* — We finally come to the influence of the French Civil Code upon German private law. Here, as is natural, the Napoleonic Code did not exercise the same ascendancy as in Latin countries. Two nations of one race are more open to reciprocal influence than two of different races. Furthermore, the French Civil Code entered German countries as part of the conqueror's system, and, for that reason, it could not have been welcome to the conquered people. And lastly, the fact that the French Code was partially based upon customary law, while German private law was essentially Roman, raised an obstacle to the exercise of any very marked influence upon German law.

Nevertheless the Napoleonic Code did exercise an influence upon German countries, simply because every force, as we already observed, produces a reaction upon surrounding conditions. Now the French Code was a veritable force: first, through its intrinsic

¹ "*Livre du centenaire, etc.*", chapter "*Le Code civil dans le Canton de Genève*", Vol. II, p. 875. [A uniform Swiss Civil Code was not enacted till December 10, 1907. — TRANSL.]

value, and second, because at that time it was the Code of the most powerful State of continental Europe.

Having, in a certain measure, felt the influence of the French Code before its own codification, German law naturally also retained the impress in its later form as the Code of William II, in 1900. It is needless to enumerate all the legal rules in which the German law has followed the French Code.¹ We will cite but two examples, — examples, indeed, of great practical value. The first relates to the acquisition of title to movable property, when the alienor is not the owner of the thing alienated; the second relates to the transfer of possession and title.

(a) Acquiring Title “a non domino.” Under Roman law, one who acquired possession of movable property “a non domino” did not become the owner, even though in good faith. There lacked, for ownership, the three years’ possession necessary to the “usucapio” of movable property.² Such was also the German common law prior to codification,³ as adopted by the Austrian Civil Code of 1811,⁴ which by Art. 367 provided merely for the exceptions to the rule.⁵ By adopting the rule of the customary law, the French Civil Code enunciated a very different principle. Article 2279 declares: “With regard to movable property, possession is equivalent to title.” By this provision the bona fide transferee of movable property becomes owner by the mere act of acquiring possession, without having to concern himself about the soundness of the title of his transferor. The only exception to this rule is in case of loss or theft. By Art. 2280, an action to recover possession may be brought by the owner within three years.⁶ The Code of William II abandoned the German rule upon this point and

¹ Cf. especially, *Ernest Barre*, “Le Code civil allemand et le Code civil français comparés entre eux” (French trans. by *Jacques Hartmann*); *Scherer*, “Principales différences entre le Code Napoléon (1804) et le Code Guillaume II (1900)”; “Livre du centenaire du Code civil”, articles by *Crome*, “Les similitudes du Code civil allemand et du Code civil français”, p. 587; *ibid.*, *Kohler*, “Le Code civil français dans la théorie et dans la pratique allemandes”, p. 617; *ibid.*, *Müller*, “Le Code civil en Allemagne”, p. 627.

² *Sohm*, “Institutionen”, § 317; *Otto Knappe*, “Grundriss der Römischen Rechtsgeschichte”, § 212; *P. F. Girard*, “Manuel élémentaire du droit romain”, p. 295.

³ *Baron*, “Pandekten”, §§ 142, 264: “Die Ersitzungsfrist.”

⁴ Art. 1466, “Ownership in a movable object is perfected through three years’ possession in good faith.”

⁵ *Stubenrauch*, “Commentar zum allgemeinen oesterreichischen bürgerlichen Gesetzbuche”, Vol. I, 367; *E. Demelius*, “Grundriss des Sachenrechts”, § 35.

⁶ *Baudry-Lacantinerie* and *A. Tissier*, “De la prescription”, pp. 587 et seq.

adopted the principle of the French law, as is shown by Arts. 932, 933 and 934.¹ For example, Art. 932 declares: "By an alienation made under Art. 929 the acquirer becomes owner even though the thing does not belong to the alienor, unless he lacked good faith at the time at which according to these provisions he would acquire ownership."² The drafters of the German Code were influenced by the same reasons as the French legislators of 1804, that is, to guarantee the safe circulation of movable property. And it is true that a free circulation gains much by the rule: "With regard to movable property, possession is equivalent to ownership." It must be conceded that economic and material interests have wrought this change in the German law; the same interests, indeed, which in the Code of William II secured the adoption of many other rules of law unknown to German common law prior to codification. For example, there are the possessory defences of the party in physical control of an object, as contrasted to the party in possession but not in control.³

(b) Transfer of Possession and Title. The second example relates to acquiring possession and title by contract. We know that under French law the transferee becomes owner "inter partes" by the mere fact of the agreement, if, of course, the thing alienated is a "res certa." It follows that the transferee, by sole effect of the contract, obtains possession of the thing in contemplation of law. Upon conclusion of the contract he lacks only physical control, and this he will also have upon delivery of the thing to him. The German common law prior to codification, following the Roman law, recognized a different rule. By it the contract did not of itself transfer title; it only had power to create, as against the "tradens", an obligation to make the "accipiens"

¹ The French rule ("With regard to movable property, possession is equivalent to title") had already penetrated the German law through the German Commercial Code of 1897, Art. 366. Cf. *Derenburg*, "Das bürgerliche Recht des deutschen Reichs und Preussens", bk. III, § 305; *Ernest Barre*, "Le Code civil allemand et le Code civil français comparés entre eux", p. 62.

² Cf. *Jules Gruber*, "Code civil pour l'Empire d'Allemagne avec la loi d'introduction, texte allemand avec traduction française", p. 354; *Barre*, *op. cit. supra*, p. 62; *Derenburg*, "Das bürgerliche Recht des deutschen Reichs und Preussens", bk. III, §§ 305 *et seq.*; *Otto Fischer* and *Wilhelm Henle*, "Bürgerliches Gesetzbuch", §§ 497, 498; *Matthiass*, "Lehrbuch des bürgerlichen Rechtes", Vol. II, §§ 58 *et seq.*: "Eigenthumserwerb von beweglichen Sachen."

³ Called respectively, "Der unmittelbare Besitzer" and "Der mittelbare Besitzer." Cf. German Civ. C. Arts. 854 to 872; *Barre*, *op. cit. supra*, p. 40; *Scherer*, "Principales différences entre le Code Napoléon et le Code Guillaume II", p. 74; *Derenburg*, *op. cit. supra*, bk. III, §§ 46 and 70 *et seq.*; *Matthiass*, *op. cit. supra*, Vol. II, §§ 5 *et seq.*

owner of the thing through tradition. Before delivery the transferee had neither title nor possession of the thing, even in contemplation of law. Setting out from the same principle, it is true, the German Civil Code has, nevertheless, introduced some important modifications. The most notable of these are Arts. 931 and 934.¹ Thus, at least as to movable property, the German Civil Code has, upon this point, approached the French Civil Code, by providing for cases where the mere intent of the contracting parties, independent of delivery, can transfer possession and title.²

(3) *International Significance of the French Code.* — The French Civil Code, the universal influence of which was so favorable to the development of solidarity between nations, is in itself distinguished by its method and its ideas. It introduced the rationalistic method into the science of law, the same method which its authors had employed. This method had a beneficial consequence. It started the period of codification in Europe. The codes first brought order and unity into the internal legislation of the different countries. They assured the reciprocal influence of nations, and encouraged scientific investigation by recognizing a higher value in the human mind. This favorable influence continues; it has been strengthened by the victory of the doctrines of codification in Germany, where they had met the strongest opposition. To nationalize legal science (the complete rejection of rationalism in law leads to this result) is to encourage the separatist tendencies of nations.

What are the underlying principles of the French Civil Code? They are fundamentally those of the Roman law: property and liberty. The Civil Code liberated man and his land. It is a product of individualism, founded upon the concept of the "*homo œconomicus*", a conception deduced from the same ideal as natural law, that is to say, non-transformism. The Civil Code of 1804 established the economic principle of "*laisser passer*." It has been called the "*Code bourgeois*", because it powerfully aided the development of wealth and consequently of social inequalities. The introduction of the Civil Code into the majority of Latin

¹ Art. 931. "Where a third party is in possession of the thing, assignment by the owner to the acquirer of the claim for the return of the thing takes the place of delivery" [trans. by Wang, London, 1907]; cf. Gruber, "*Code civil pour l'Empire d'Allemagne avec la loi d'introduction, texte allemand avec traduction française*", pp. 354, 355; Dernburg, "*Das Sachenrecht*", p. 303.

² Crome, "*Livre du centenaire du Code civil*", chapter on "*Similitudes du Code civil allemand et du Code civil français*", p. 602.

countries, and its influence upon other States, have given to European law of the 1800s its excessively individualistic stamp. But this has been absolutely inevitable. Only when a principle becomes excessive is its abandonment assured. Egoism was necessarily destined to be pushed to its extreme limit, because of a merciless individualism. Then men began to experience a distaste for this spirit and to think more seriously about human solidarity and brotherhood.¹

§ 3. **The Austrian Civil Code.** — The Austrian Civil Code, promulgated in 1811, under the reign of the Emperor Francis I,² has not enjoyed so far-reaching a renown as the Napoleonic Code, although it was a very excellent work. The fact is that Austria, repeatedly conquered by Napoleon, naturally, could not by its codification, any more than by other internal events of its history, exercise upon the world an influence equal to that of France. Moreover, it was not to be expected that the Latin nations would take as a model the Austrian Code (which was in fact a German code) rather than the French Code. The Austrian Code had only eastern Europe towards which to spread. It resembled Austrian

¹ *Esmein*, "Livres du centenaire du Code civil," chapter on "L'originalité du Code civil", Vol. I, p. 5, disputes the rationalistic character of the legislation of 1804 and shows the intimate relation of this law to the prior period. We believe that a distinction is necessary. On the one hand, the rationalism of the French codifiers of 1804 cannot be denied. They were all adherents of the philosophy of the 1700s, which dominated the Revolution. Proof of this lies also in the fact that the Civil Code accorded so little place to legal custom, by which we mean that, under the Code, law has but one source, legislation, *i.e.* the conscious will. (Cf. *Pierre Perrenet*, "La Coutume et le Code civil", in "Revue critique de législation", June, 1906.) To admit that custom is a source of law, would have been to recognize that law can be created unconsciously by the people, a principle which was not at all in favor with the rationalists. Nor does the Civil Code of 1804 give recognition to the decisions of the courts, whose functions, due to the evolutionistic doctrine, are tending to exceed the proper limits of judicial power.

But, with regard to the substance itself of the Code, it is doubtless true that the codifiers of 1804 introduced few innovations. The reason is simple. There was no great need for change, for the rules governing the affairs of private life already existed in a large measure in the French society of that period. The codifiers had only to arrange them into a code, adding such new provisions as were rendered necessary by the new political order created by the Revolution. Moreover, we observed above that even when one adheres to the doctrine, as we do, that the legislator should also proceed upon a rationalistic basis, his creative rôle is small in the sphere of private law, for the reasons which we have explained.

² The principal author of this Code was *Zeiller*, who has left a commentary upon it: "Commentar über das allgemeine bürgerliche Gesetzbuch" (1811-1813), 6 vols. Cf. on Austrian codification: *Stubenrauch*, "Commentar zum allgemeine oesterreichischen bürgerlichen Gesetzbuche", Vol. I, "Einleitung: 1. Zur Geschichte der Codification des Civilrechtes in Oesterreich"; ["Festschrift zur Jahrhundertfeier des Allgemeinen Bürgerlichen Gesetzbuches", 2 vols., Vienna, 1911. — Ed.]

commerce, which, unable to expand westward, had to take the Balkan route. The "General Austrian Civil Code", long before Bismarck's famous words: "Drang nach Osten", determined the Austrian path of expansion.

The Code of 1811 was in fact adopted in Serbia, though not completely. It was abridged, and some native rules were incorporated, relating to family law and certain national institutions, such, for example, as the "zadruga" (undivided family) and the priority of the male line in successions. The Austrian Code brought into Serbia the property conceptions and the individualism of the Romans, and these have exercised a harmful influence upon the "zadruga", which is based upon altogether different notions, *i.e.* those of collective ownership and solidarity maintained by a life in common. Through the Code of 1844, it is true, Serbia entered the European family, but by the same act she lost the chief force, economic as well as moral, *viz.* the "zadrugas", through which she had been able, during four centuries of Turkish domination, to preserve her national character. From 1844 Serbia has been more and more subject to the influence of western culture, more drawn towards central Europe. This has been the cause of those agonizing internal derangements which, on the one hand, forced the young State towards her racial sister Russia, and on the other, turned her toward central Europe, to which she was now united by a common civil law.

The Austrian Code is also in force in Croatia, Slavonia, and Transylvania. It was introduced in Hungary at the same time as in Croatia and Slavonia (1852), but it remained operative only up to 1860, when national Hungarian law was restored. The codification of Hungarian private law was undertaken a long while ago. In 1873 a Government commission refused to accept the Austrian Code for Hungary. Since then a preliminary draft has been accepted,¹ and a commission is now occupied in revising the project in order to fix upon a final text. The draft of the Hungarian Code, though profiting by different foreign codifications, possesses a fundamentally national character, explainable by the peculiar situation of the Magyar people.² Surrounded on all sides by German, Serbian, and Roumanian nationalities, it finds itself forced to give a national stamp to all that it does, in order the

¹ Called, "Magyar általános polgari törvénykönyv tervezete, Első szöveg", *i.e.* "Project of a general Hungarian Civil Code, First Draft."

² This information concerning Hungarian codification we owe to Grosse Schmid Béni, Professor of Civil Law, University of Budapest.

better to combat those nationalities for the preservation of its own.

Lastly, we should add that, prior to Italian unity, the Austrian Civil Code had likewise been adopted in the Lombardo-Venetian kingdom, which at that time had fallen under the sovereignty of the Austrian Empire.¹

§ 4. **The German Civil Code.** — We now come to the German Civil Code, which, from the point of view of the influence which it may have upon European private law, may be placed upon the same plane as Roman law and the French Civil Code. This influence has already been felt in countries which have undertaken to codify their private law, as, for example Greece² and Serbia, where the German Civil Code will serve as the basis of the work. To them should be added Switzerland,³ whose code of 1907 certainly must have felt the influence of the German Code. Moreover, German private law had already been utilized when the Swiss Federal Code of Obligations was adopted in 1881.

We should mention, too, that the draft of the Hungarian Civil Code was also subject to the ascendancy of the German Civil Code, at least with respect to method and form. And as to Austrian private law, there are writers, like Wellspacher, who are putting forward the idea that it should be studied and completed with the help of the German Civil Code.⁴

(1) *The German Civil Code in France.* — It was especially in France that the ideas of the German codifiers won ground. The influence of German private law had long made itself felt upon the French mind. It was a good sign when France, after a long period of indifference, nay almost disdain, for all that transpired beyond her borders, realized that her own interests as well as those of civilization in general were in no wise in accord with her isola-

¹ *Chironi*, "Livre du centenaire du Code civil", chapter on "Le Code civil et son influence en Italie", p. 771: "This Code was, moreover, a legislative work which admittedly revealed profound science and a broad sense of equity. We may even say that in many of its parts, especially those relating to rights over things, it could still serve as a model to-day."

The Codes of the Cantons of Aargau, Bern, Lucerne, and Solothurn, prior to Bluntschli's labors, were allied to the Austrian Civil Code: cf. *Planiol* ("Traité élémentaire du droit civil", Vol. I, p. 54). Bluntschli's legislative work was the "Civil Code of the Canton of Zürich", drafted by him and put into operation in 1855. He left a commentary upon his own Code: "Privatrechtliches Gesetzbuch für den Kanton Zürich mit Erläuterungen", cf. *Planiol, ibid.*, Vol. I, p. 54.

² *Planiol, ibid.*, Vol. I, p. 52.

³ The drafter of the Swiss Civil Code was Professor Eugen Huber.

⁴ "Die Zukunft des oesterreichischen Privatrechtswissenschaft" (Vienna, 1907).

tion, and opened her mind to the scientific influences of foreign countries.

It would be a mistake to attribute to the influence of the German Civil Code the sympathies of French jurists for the historical and evolutionistic school, for their sympathy began considerably prior to the German Code. It dated from the day when French jurists, feeling limited by their own Code, which had come to appear inadequate to meet the then state of social and legal relations in France, were forced to appeal to the historical and evolutionistic method to make possible the solutions of the difficulties which had not been anticipated or regulated by the Code of 1804. Quite naturally, so soon as interest centered around the historical and evolutionistic school, whose native soil was Germany, French authors had to consult the works of the jurists beyond the Rhine. These works opened their eyes to new juridical horizons. The traditional method under the Napoleonic Codes, of interpretation by syllogism, ignoring legal history and social evolution, came to seem worn out and unscientific. The method which had been pursued in the study of the German common law prior to codification attracted them, and led them to introduce more philosophy and deeper historical research into their work.

This last tendency of French legal investigation inevitably increased after the appearance of the German Civil Code, to which French jurists proceeded to devote a degree of attention which did credit to their catholicity of view. The drafters of the German Code had, indeed, gone about their task in a most scientific way. First they set forth, a "general part",¹ those principles common to all the institutions of private law; they then passed to the exposition of the separate private rights, which they placed in a "special part."² It was a scientific method, because it consists in discovering and assembling, in a given class of phenomena, the characters which are common to them all, causing them to fall into the same category; and after this first labor, in describing the characteristics by which each of these phenomena is distinguished from the others. The first is a work rather of philosophy; the second is one of description. We may say, therefore, that the "general part" of the German Civil Code is the philosophy of German private law, and that

¹ "General Principles", Arts. 1-240.

² Book II, "Law of Obligations", Arts. 241-853; Book III, "Law of Things", Arts. 854-1296; Book IV, "Family Law", Arts. 1297-1921; Book V, "Law of Inheritance", Arts. 1922-2385.

the "special part" is a description of the different institutions of that law.¹

In addition to this first effect of the German Civil Code upon its French interpreters, — that is, the adoption of a new method in French legal science, — the German Code stimulated a study of new doctrines in France, several of which were unknown. Such, for example, are the protection of mere physical detention of a thing through possessory defences,² the misuse ("abus") of a right ("sic utere tuo ut alienum non laedas"),³ the "real agreement",⁴ the land charge;⁵ the hypothec made to the owner;⁶ the system of German land registration books, so different from that of the French Civil Code; the unilateral obligation; the community of ownership,⁷ etc.

¹ The draft of the Hungarian Code contains no "general part." It is divided into: "Law of Persons", Arts. 1-93; "Family Law", Arts. 94-484; "Law of Things", Arts. 485-913; "Law of Obligations", Arts. 914-1793; "Law of Inheritance", Arts. 1794-2043.

² "Der unmittelbare Besitz." Cf. *Saliciles*, "La théorie possessoire du Code civil allemand", in "Revue critique de législation" (1903), p. 592; (1904), p. 33; *id.*, "De la possession des meubles", in "Études de droit allemand et de droit français."

³ "Missbrauch des Rechtes." French literature upon the misuse of a right is copious. We may cite the following, given in *Ripert*, "L'exercice des droits et la responsabilité civile", in "Revue critique de législation" (June, 1906): *Saliciles*, "De l'abus de droit," in "Bulletin de la Société d'études législatives" (1905); *Josserand*, "De l'abus des droits" (1905); *Max Desserteaux*, "Abus de droit et conflits de droits", in "Revue trimestrielle de droit civil" (1906); *Planiol*, "Étude sur la responsabilité civile", in "Revue critique" (1905, 1906); *Haurion*, in *Sirey* (1905); *Saliciles*, "Les accidents du travail et la responsabilité civile" (1897); *id.*, *Dalloz*, 1897, I, p. 433; *Josserand*, "De la responsabilité du fait des choses inanimées" (1897); *id.*, *Dalloz*, 1903, II, p. 228; 1904, II, p. 257; 1905, II, p. 497; *Teissière*, "Essai sur le fondement de la responsabilité" (1901); *Germette* (thesis, 1903); *De Haëne*, "Flandre judiciaire" (1901); *Ripert* and *Teissière*, "De l'enrichissement sans cause", in "Revue critique" (1899); *Ripert*, "De l'exercice du droit de propriété" (1902). The subject has also been treated more or less at length in the commentaries on the Civil Code: *Baudry-Lacantinerie* and *L. Barde*, "Des obligations", Vol. III, p. 2, pt. 1077; *Planiol*, "Traité élémentaire du droit civil", Vol. II, p. 265.

⁴ "Der dingliche Vertrag."

⁵ "Grundschuld."

⁶ "Hypotheca in re propria."

⁷ "Gesammte Hand." Cf. *L. Josserand*, "Livres du centenaire du Code civil", chapter on "Essai sur la propriété collective", p. 357. We must further observe that — speaking only of family law — the influence of German civil legislation has also made itself felt in the subject of investigation of paternity. Here French courts have striven to give to Art. 340 of their Civil Code, prohibiting investigation, a broader interpretation (Arts. 1705-1718 of the German Civil Code: "Legal Status of Illegitimate Children"). Similarly, French law inclines towards the German Civil Code as regards the situation of the married woman. Here the German Code had appreciably improved upon the status of the French woman. Cf. *E. H. Perreau*, "Chronique législative du droit civil", in "Revue critique de législation" (May, 1906), p. 303; (Jan.), pp. 45 *et seq.*

There is no doubt that the eagerness with which French scientists received the German Civil Code, as well as their zeal to know it and to penetrate its spirit, exercised a strong influence upon the French plans for future legislative labors.¹ Furthermore, it is no less certain that legislative method, a problem which hardly interested France at all before the promulgation of the German Civil Code, is no longer neglected in France; and this is due to the influence of the German Civil Code, in which French authors are unanimous in recognizing order and rigid method.² All this, we need scarcely say, will some day bring about beneficial results from the point of view of the unification of private law in France and in Germany.

And an evidence of the influence of these studies in bringing together the scholars of both countries is found in the "Book of the Centenary of the Civil Code", where German jurists, along with French jurists, eagerly celebrated with a true sincerity the fame of a work which, nevertheless, had reason to arouse among the former the memory of national misfortunes when Napoleon imposed his law upon Germany.

(2) *Distinguishing Principles of the German Code.* — What are the fundamental ideas which distinguish the German from the French Code? It is said of the German Code, as it was once said of the French, that it is too exclusively a code of property rights, drafted with a view to protecting the interests of the well-to-do classes, and giving too little place to the modern ideas of protection of the weak and of social solidarity.³ It is certain that the German Civil Code does not differ in its fundamental principles from the French Code. The reason is not hard to discover. German society in 1896 was constituted very nearly like the French society of 1804. Property and liberty, the two distinctive characters of the Napoleonic Code, have retained the same importance in the Code of William II. For a hundred years the individualistic conception has not ceased to control modern society, and the doctrine of "laissez faire", while attacked by socialistic ideas, continues

¹ We should remark here that it is a much debated question in France whether a new code should be drafted, or whether it would not be better to amend the existing Code by special laws; cf. *Larnaude*, "Livres du centenaire du code civil", chapter on "Le Code civil et la nécessité de la revision", p. 901; *Marcel Planiol*, *ibid.*, "Inutilité d'une revision générale du Code civil", p. 955.

² For example, *Gény*, *ibid.*, "La technique législative dans la codification civile moderne", p. 989.

³ *Sohm*, "Communication au Congrès du droit comparé de 1900", p. 5, cited by *Gaudeмет*, "Livres du centenaire du Code civil", chapter on "Les codifications récentes et la revision du Code civil", p. 967.

none the less to form the foundation of economic relations. The reason is that social, legal, economic, and political principles do not disappear so quickly. They die hard. But we should not complain of this. We may compare them to a fruit, which we do not throw away until we have pressed out all its juice. A legal principle does not age and become stale until it has ceased to serve any purpose, until there has been extracted from it all the good which it contains. It is only after a principle has become absolutely unproductive that it is replaced by another. Now, the principle of individualism has not yet reached that state of uselessness; it has not yet yielded up all its benefits. Designed to furnish the world the greatest wealth possible, it must endure until the needs of humanity are sufficiently provided. It may then be cast aside and the principle of the division of wealth and the equal distribution of property be substituted. But before proceeding to distribute, there must be wherewith to distribute.

And yet the German Code, as compared to the French Code, even from this point of view, marks important progress. It has been unjustly criticized as not being sufficiently favorable toward the modern idea of social solidarity. We believe, on the contrary, that the German codifiers recognized this conception in sufficient measure, — at least in a measure suited to the individualistic foundation upon which their work was to be based. Article 226 of the German Civil Code does restrain the power of the possessor of a right by the following rule: "The exercise of a right which can only have the purpose of causing injury to another is unlawful."¹ Prior to the German Code a subjective right was an unrestricted authorization; from this it followed that the possessor of the right could, in his exercise of it, have as his sole purpose to cause injury to another. Now he can no longer do so; the German Civil Code commands him to think not only of his own interests but also (and we have just seen in what measure) of those of his fellow-men. The idea is certainly opposed to the individualistic conception, according to which man need only be concerned with his own interests, egoism being, it was believed, the best stimulus to progress. In our opinion, Article 226 is out of place in a code of private law. It is directed against the idea itself of private law, just as the socialist idea is the contrary of the individualistic idea. The German Civil Code is a legislative work which adopts a fundamental principle and forthwith proceeds to break it down.

¹ [Trans. by Wang, London, 1907.] Cf. *Jules Gruber*, "Code civil pour l'Empire d'Allemagne, avec la loi d'introduction", p. 57.

Another criticism has been made of the German Code. Though more learned and more imbued than other codes with the spirit of logic, it is represented as running the danger of arresting future efforts in practical or theoretic legal development.¹ From this point of view, the French Civil Code is said ² to be superior to the German; it leaves greater room to free interpretation of the judge. But it is the Swiss Civil Code of 1907 which may best be cited as model legislation. It has respected the theory that a civil code should not, by casuistry and enslavement of the judge, prevent the latter from bringing it, at need, into unison with the leading ideas of the time, or from maintaining it, as it were, abreast with social evolution.

(3) *The Judicial Function under the German, Swiss, and French Codes.* — Without stopping to examine a theory lying outside our inquiry, we shall limit ourselves to a brief explanation of the difference in this regard between the German and the Swiss Civil Codes, and the French Civil Code.

To draft a civil code which (like the Swiss Code) will give the judge elbow-room among the legal rules at his disposal and will enable him thus to follow, in applying the principles of the code, the mutations and vicissitudes of the legal life of the people, is evidently to support the doctrine that the regulation of the relations of private law does not fall solely to the legislative body (that is, to men who, in their task of law-making, necessarily proceed in a rationalistic manner); and that this regulation should be primarily the result of slow juridical evolution in the masses of the people. Now, in our opinion, that doctrine is precisely what the strongly conservative German mind does not comprehend, and for that reason is unwilling to admit. It does not believe that juridical rules are the work of the people, because that is a primarily democratic, not to say revolutionary principle. The German mind does not conceive that the direction of the State belongs to the nation at large. According to the German conception, the nation, acting as it does by sentiment rather than reason, cannot conduct the affairs of State as intelligently as highly cultured individuals whom calm intellectual effort guarantees against impulses to which the individual is liable, when acting as part of the mass of the nation.

Consequently, the German Code has come (at least so we believe)

¹ Cf. *Gaudeмет*, "Livres du centenaire du Code civil", chapter on "Les codifications récentes et la révision du Code civil", p. 972 [*post*, Chap. VII]; *Salvielles*, "Introduction à l'étude du droit civil allemand", pp. 88 *et seq.*; *Gierke*, "Entwurf", pp. 58 *et seq.*, cited by *Gaudeмет*, *op. cit.*

² *Gaudeмет*, *op. cit.*, p. 972.

as a reaction against the French Code, which, being a product of the Revolution, propagated its principle: "Everything by the people." The German Civil Code attempts, in this regard, a counter movement in favor of the contrary principle, "Everything by conscious and enlightened reason." It admits, indeed, the idea of social solidarity (we have just seen that such is the sense of the rule of the abusive exercise of a right, Art. 226), but it does not grant that that idea, any more than the other leading ideas, might be the work of the unconscious masses of the people rather than of the intellectual class. The German intellectuals are favorably disposed to do much, even to do all, "for the people", but they think that they must proceed after the manner of a guardian: everything *for* the minor, but nothing *by* him.

The future will show whether the German mind, as we have just described it, is to convince the world and dominate it, — at least to the same degree as the French Civil Code. Perhaps the history of humanity is nothing more than the successive ascendancy of those two contrary principles: that of the unconscious (matter): and that of the conscious (mind).

§ 5. **The Swiss Civil Code.** — The latest codification, chronologically, is that of Switzerland, of 1907, the merits of which we can not here enter into. It was carried out under the influence of the German Code. "As examples of theories having a German origin in the draft of 1904,"¹ wrote Gaudemet,² "we may mention community of property ('gesammte Hand', Arts. 646-648) and the hypothec, conceived as a principal and not an accessory right ('selbständige Hypothek')."

But the Swiss Civil Code also has its points of originality. We shall mention but two, which are typical of the ideas which the Swiss codifiers held upon the functions of the judge and upon the nature of subjective private right:

(1) Article 1, paragraphs 2 and 3, declares: "Where no legislative provision is applicable, the judge shall decide according to customary law, and where there is no custom, according to the rules

¹ "Livres du centenaire du Code civil", chapter on "Les codifications récentes et la revision du Code civil", p. 970, note 1, [*infra*, Chap. VII].

² At the time of Gaudemet's article, the Swiss Civil Code was but a draft. That author continues: "We know how much the authors of the Federal Code of Obligations thought well to draw in 1881 from German doctrines." He then adds: "It may be foreseen that after the announced revision, the new Code of Obligations will retain the same character as the present." The Commission of revision, convened at Langenthal, again borrowed from German law, introducing, for example, the "reprise de dette"; cf. "Journal de Genève" (Oct. 4 and 9, 1904).

which he would establish were he acting as legislator." "He shall draw from the settled rules of writers and of the courts."¹ As is evident, the Swiss Civil Code confers upon the judge a very much more important and a different power than that given him by the German Civil Code. In the Swiss Code, the judge is elevated to a legislator whenever a statutory provision or custom is lacking by which the particular case can be determined. No need to doubt but that the Swiss judge will soon take to himself a similar power in the case of an obscure or faulty law. In place of inquiring into the meaning of an ambiguous text, it will be easier for him to create a new rule. Now, since it is a current doctrine that the legislator should not proceed by the exercise of his reason, but should reflect jural life as it appears in the people at the time of the making of the law, the rule of paragraph 2, of Article 1 of the Swiss Code (by which the judge must, if the conditions required be fulfilled, decide according to the rules which he would establish were he legislating) would seem to indicate the adoption by the Swiss codifiers of the new method of judicial interpretation, known as the evolutionistic method. We are strengthened in our conviction by the acceptance by the Swiss Civil Code of custom as a source of law, a doctrine also based upon the evolutionistic idea. Briefly, the Swiss Civil Code regards the law as a result of social evolution rather than as a rational creation of the human mind. This is a conception quite different from that which we saw present in the mind of the German law-maker. It is, moreover, quite natural in a republic, for republics are founded on the principle that the State should follow the route traced by the people. The evolutionistic idea is nothing more than this principle applied to social phenomena.

But it must be admitted that paragraph 2, Article 1, of the Swiss Civil Code creates no obstacle to the application of the rationalistic idea. By virtue of this rule, a Swiss judge may, in fact, supply an omission of the Code in a rationalistic manner, by maintaining that that would be the way he would proceed were he acting as legislator. Paragraph 2, Article 1, would thus be a two-edged sword.

(2) As to the theory of the misuse ("abus") of a right, adopted by Article 226 of the German Civil Code, with the limitations we have already seen, the Swiss Code, following the German law, has given it a yet larger scope. This is evident from Article 2 of the

¹ [The Swiss Civil Code has been translated by *Robert P. Schick* for the Comparative Law Bureau of the American Bar Association (Boston, 1915). The present translator has however used his own translation. — TRANS.]

Swiss Code: "Each person must exercise his rights and discharge his obligations in good faith. The manifest misuse of a right is not protected by law." Consequently Gaudemet was right in affirming that the draft of the Swiss Code then marked the highest point to which "the socialization of civil law" could attain in positive legislation. Similarly, there is no reason for surprise that Anton Menger, notable for his criticism of the German Civil Code as merely a code of property rights, is, on the whole, satisfied with the Swiss code, "designed for a purely democratic republic."¹

¹ *A. Menger*, "Das bürgerliche Gesetzbuch und die besitzlosen Volksklassen" (3d ed.), preface, pp. vi-vii.

CHAPTER VII

A CENTURY'S PROGRESS IN RESHAPING THE LAW;
THE GERMAN AND THE SWISS CODES, COMPARED
WITH THE FRENCH CODEBY EUGÈNE GAUDEMET¹

§ 1. The Problem of Revision; Value of Germany and Switzerland as Examples.	Principles through New Texts. (3) Admission of Principles without any Foundation in the Texts. (4) Changes Requiring Legislation.
§ 2. Napoleonic Code; Criticisms of Theory: (1) Obsolete Doctrines. (2) New Legal Theories. (3) Scientific Arrangement.	§ 6. Criticism of Specific Provi- sions: (1) The Married Woman. (2) Protection of Chil- dren. (3) Illegitimate Children. (4) Suc- cession. (5) Property. (6) Contracts.
§ 3. Economic and Sociological Criticisms.	
§ 4. The Same; Class Legislation.	
§ 5. The Same; Old Concepts of Liberty and Equality: (1) The Effects of Solidarity. (2) Admission of New	§ 7. Conclusion.

§ 1. **The Problem of Code Revision.** — Between a law, however well drafted, and the social surroundings in which it is applied, we seldom find an absolutely perfect and complete adjustment. A law is naturally simple and fixed; its social surroundings are complex and variable. The text will necessarily appear at times either unresponsive and ill suited to the special situations unforeseen by

¹ [This Chapter represents the author's essay entitled "Les Codifications récentes et la revision du Code Civil", in the volume "Le Code Civil: Livre du Centenaire" (Paris, 1904), — a work of composite authorship, edited by *Albert Sorel* for the *Société des Etudes Législatives* of Paris, in celebration of the Centenary of the Code Napoleon.

The author is professor in the Faculty of Law at the University of Dijon. Other works of his are: "Étude sur le transport de dettes à titre particulier" (1898); "L'Abbé Galiani et la question du commerce des blés à la fin du règne de Louis XV" (1899).

At the time of original publication of this Chapter, the draft Swiss Civil Code had not been enacted; the translator's skill and labor have added in parenthesis the citations to the Code sections as enacted and have substituted the text of the enactment for the text of the draft where articles are quoted; his own translation has invariably been made. The author's comments are not affected by the slight changes made in the enactment; the Editorial Committee was notified by him that the insertion of the above citations would suffice. — Ed.]

the legislator, or, if the law is old, as inspired by obsolete and antiquated ideas. The best laws do not escape this rule; to prove them subject to it is not a sufficient reason to condemn them.

Furthermore, we have a remedy for such inevitable defects. Experience has taught how the interpretation of inadequate or antiquated texts, by text-writers and courts, can fill the insufficiencies of the written rules and sometimes breathe new life into superannuated regulations. One of the most important results attained by French legal science in the last ten years has been the recognition of the justification of this method and the determination of its rules.¹ And there are other countries where the same ideas seem to have now received official acknowledgment.²

We must bear all this in mind when we consider the question of the revision of the Civil Code in France. It is not enough, when we declare a complete recasting of our legislation necessary, merely to show its omissions or to mark the disunion between the juridical conceptions of 1804 and those of the early 1900 s. That is an easy task, warranting no such conclusion. Reduced to its true terms, the problem consists in inquiring whether the actual want of balance between the Code and present social and scientific conditions is such that the combined effort of authors and courts is powerless to rectify it, and that an appeal to legislative reform is inevitable. Assuming that such legislative action might be effective and timely, it may, nevertheless, admit of numerous degrees of consummation, as: complete recasting, partial revision limited to certain subjects, or the enactment of special laws unincorporated into the Code.

In this very brief space we cannot examine the problem, as presented, in all its complexity. We desire only to point out matters in aid of a solution which the examination of foreign law is able to furnish. The comparative method in law holds an accepted place to-day among juridical methods. It does not seem, however, that any one has so far thought of applying it to the present problem. Attention has been drawn to the contrast

¹ *Gény*, "Méthode d'interprétation et sources en droit positif."

² Draft, Swiss Civil Code, Art. 1, pars. 2, 3: ["If no text of the law applies, the judge shall decide according to customary law, and, in the absence of any customary law, according to the rules of law settled by the text writers and the courts. If there is no recourse to any one of these sources, he shall apply the rule which he would establish if he were acting as legislator." This provision reappears with almost no change as Art. 1, par. 2 of the Code, adopted Dec. 10, 1907, in force since Jan. 1, 1912. The German Civil Code in its final form did not retain the provisions of the draft regarding method. As to the present state of the problem in Germany, cf. *Salvilles*, "Introduction à l'Étude du droit civil allemand", 88 *et seq.* — TRANSL.]

between the social tendencies of to-day and the individualism of 1804; the Code has been set up in opposition to the "new law";¹ the effort, which becomes ever more pronounced, toward the "socialization of law",² or toward the "infusion of socialism into private law",³ has been pointed out. And from all this, we are asked to conclude the necessity of an entire reform of the French Civil Code, of a complete and radical revision that would establish, or at least prepare, the way for a true social transformation.⁴

If weighed in the light of the most recent foreign codifications, such a conclusion would seem rather illusory and hazardous. The countries neighboring to France, where jural and social surroundings are sensibly the same, have recently been elaborating a civil legislation, which we may observe; and the mediocre results of these efforts show conclusively to what extent the new Codes may, without revolution and upheaval, satisfy the legitimate aspirations which manifest themselves to-day. And, when we compare the foreign texts with the French Code — not as in 1804, but as understood to-day after a century of study and application — we observe that, in order to secure for it the benefit of all the positive gains of foreign law, a few changes in detail will suffice, — unpretentious, easily reconciled with the present texts and very often prepared long ago by text-writers and courts. To exceed this would be to go beyond the facts of experience, to anticipate the results of a true revolution, and to create a work condemned in advance to failure, since it would be opposed to contemporary juridical sentiment.

Value of Germany and Switzerland as Examples. — In this respect two documents are of particular value: the German Civil Code of 1900, and the Draft of the Swiss Civil Code, as presented by the

¹ *Marime Leroy*, "Le Code civil et le Droit nouveau" (1904); "Le Centenaire du Code Civil", in "Revue de Paris" (1903).

² *Charmont*, "La socialisation du Droit", in "Revue de métaphysique et de morale" (1903).

³ *Vivante*, "L'influenza del socialismo sul diritto privato" (inaugural address, Univ. of Rome, 1902).

⁴ As indicating the tendencies of French scientific socialism, cf. *Andler*, Introduction to the translation of the two works of *Anton Menger*, "Le Droit au produit intégral du travail" (1900), and "L'État socialiste" (1904). Upon the Italian Code, the governing ideas of which are the same as of the French Code, cf. the very pointed criticism of *Salvioli*, "I difetti sociali del Codice civile in relazione alle classi non abbienti ed operaie" (inaugural address, Univ. of Palermo, 1890). Also, the more moderate criticism of *Caragnani*, "Il Codice civile e la questione sociale", which prefers a progressive reform by special laws (app. IV to his "Nuovi orizzonti del diritto civile", pp. 421 *et seq.*); and by the same author, "I fossili e le lacune del Codice civile", *ibid.*, app. III.

Federal Council to the Federal Assembly.¹ From our particular point of view, however, they are of unequal importance. The German Code, a masterpiece of method and science, appears as the superb epitome of all the results which German text-writers obtained during the 1800s in the field of the "Pandects" or German private law.² But many of its expositors are of the opinion that, from the social point of view, it does not answer all the requirements of a democratic environment. It has been said of the German, as of the French Code, that it is too exclusively a "Code for the well-to-do",³ drafted with the intention of protecting the propertied classes and giving too little space to the modern ideas of the protection of the weak and of social solidarity.⁴ Immediately upon the draft's appearance, Anton Menger published some severe and perhaps excessive criticisms in this regard, which attracted wide attention.⁵ But even those who reject, as we do, the Viennese professor's principles of social philosophy⁶ will no doubt regret that the German legislators did not in larger measure heed his observations.

Quite different is the Swiss Draft. Though inspired by German science,⁷ it has remained very simple in technique; it has carefully avoided doctrinal subtleties; in a thoroughly practical spirit it

¹ May 28, 1904.

² *Saleilles*, "Introduction à l'étude du droit civil allemand" (1904), pp. 104 *et seq.*

³ *Sohm*, "Communication au Congrès de Droit comparé de 1900", p. 5.

⁴ *Saleilles*, *op. cit.*, p. 120. For an example of the obsolete character of the theory in the German Civil Code regarding liability for tort, *cf. Saleilles*, "Essai d'une théorie générale de l'obligation d'après le premier projet du Code civil pour l'Empire d'Allemagne" (2d ed.).

⁵ "Das bürgerliche Recht und die besitzlosen Volksklassen" (1st ed., 1890; 3d ed., 1904). *Cf.* particularly pref. (3d ed.), p. vi: "As the creation of an aristocratic military State, whose armies have been everywhere victorious during the past generation, the Civil Code possesses a truly conservative character; in hardly any code of recent times have the ruling and propertied classes so thoroughly asserted the position of power which they now civilly enjoy, as in this one."

⁶ A clear and vigorous synthesis of it is found in *Menger's* last work, "L'État socialiste" (Fr. trans. by *Milhaud*, 1904).

⁷ We know to what extent the drafters of the Federal Code of Obligations took advantage, in 1881, of German doctrines. As an example of the theories of German origin contained in the Draft of 1904, we may cite the joint ownership ("gesamte Hand") of Arts. 646-648 [Civ. C. 652-654, *TRANSL.*], and the mortgage, here treated as the primary (not subsidiary) right ("selbständige Hypothek" or "independent mortgage"); *cf.* Message du Conseil Fédéral, May 28, 1904, p. 9. It is to be foreseen that in the projected revision the new Code of Obligations will preserve the same character as the present Code. The Commission of revision, at a recent meeting at Langenthal, has again taken from the German law of obligations; for instance, by introducing the contract to pay the debt of a third party ("reprise de dette"); *cf.* "Journal de Genève" (Oct. 4 and 9, 1904).

has avoided any ambition as to general arrangement or detail of style. By its clearness and simplicity, therefore, it has so far as possible realized in its form the ideal of democratic legislation. This it has also attained from another point of view. Its authors succeeded, with great breadth of mind and wise moderation, in achieving, among the reforms demanded to-day, all those which are practicable without being carried away by Utopian dreams. The Swiss Draft may be said to mark to-day the farthest point attainable by positive legislation in the socialization of civil law. And Menger, who was so severe in his criticism of the German Code, is not far from recognizing this himself when he observes that the Preliminary Draft of 1900-1901, "intended for a purely democratic republic", has largely applied the ideas for which he contended.¹

Evidently, then, the Swiss Draft is of still greater interest to us than the German Code. To it we prefer to turn in endeavoring to measure the distance separating the French Code from those legal systems most imbued with the modern spirit.

In our examination we must proceed from two different points of view. We must distinguish among the underlying principles of the Code those of a theoretic or doctrinal order from those pertaining to economic and social organization. The question of the reasonableness and the extent of the revision arises in the one case as in the other; but it may be differently answered according as we study it from one or the other aspect. It is of this two-fold inquiry that we would give a very brief summary.

§ 2. **Code Napoleon; Criticisms of Theory.** — First, then, from the scientific point of view, the defects of the Code Napoleon can hardly be denied. It would no longer be of interest to criticize the arrangement of its materials. We must also recognize that many theories which before 1804 constituted the bases of legal education are now abandoned or at least questioned. We no longer conceive in the same manner as did the drafters of the Code either civil liability, rights "in rem", rights "in personam", or perhaps even rights in the broadest sense; for the principle of the misuse of a right, now more and more generally accepted, implies the rejection of the maxim: "*Neminem laedit qui suo jure utitur*," and assumes, therefore, a profound modification of the idea of right itself. And lastly, our Code of 1804 contains no provision upon a great number of modern doctrines which have found place in foreign legislations. Suffice to mention here the obligation arising from a

¹ "Das bürgerliche Gesetzbuch und die besitzlosen Volksklassen", pref. (3d ed.), pp. vi-vii.

unilateral declaration of intention, the contract to pay the debt of a third party, joint ownership, and many other judicial conceptions well known to modern writers, but of which no traces are found in our Code. Upon all these points the contrast is absolute between the French work and the German Code with its rigid arrangement, its perfect technique, its sound dogmatic value.¹

From this scientific defect should we conclude the necessity of a complete revision? Nothing would be more questionable. A code is not, in fact, the work of theory. Its function is not to co-ordinate, according to a fixed plan, formulæ that have been elaborated in the works of theoreticians, nor to construct systems in a learned manner by logical deduction. It must primarily offer to the practice of law clear and precise solutions which shall guide and never hamper the courts. Now, such an end can be reached, even by texts that do not exactly reflect the latest scientific ideas, even by codes whose general arrangement is open to criticism; such is precisely the case with the French Code.

Let us take up the three angles of criticisms which we enumerated; we shall see that none of the defects pointed out need prevent the Code Napoleon from still fulfilling its essential function.

(1) *Obsolete Doctrines*. — In the first place, it is very certain that there exists a breach between the juridical conceptions of the drafters of the Code and the ideas now more and more generally received by text-writers. That, however, in no way impedes the free development of legal science and practice. Indeed, the expounder of the law is not bound by the doctrinal ideas of the legislator; alone the positive provisions of express texts bind him. And precisely one of the greatest merits of the Civil Code, often pointed out, is that it is extremely sparing of theoretic definitions, and that it has carefully avoided all doctrinal principles. This quality, which it has in common with the Draft of the Swiss Code, lends it an extreme flexibility and permits it to adapt itself without difficulty to scientific progress.

Our Code is perhaps even superior to the German in this respect. The latter, more learned, more imbued with the spirit of logical construction, incurs more than ours the risk of arresting the force of the future development of the theory and practice of law. It is to be feared that, temporarily at least, the efforts of the commentators stop short at pure exegesis; indeed, in spite of the very broad rules of application laid down since the promulgation of the

¹ *Saleilles*, "Introduction à l'étude du droit civil allemand", pp. 104 et seq.

Code by several German jurists,¹ it would seem, from a perusal of the legal reviews and recent commentaries, that German science has somewhat altered its direction. It is also to be feared, according to the felicitous expression of Saleilles, that "if a bold system of interpretation be not created which may break through the exceedingly compact arrangement of the whole Code, there may ensue a kind of confusion in the texture of its logical principles and social progress may be slow to penetrate it."² At the time of the publication of the German First Draft, Otto Gierke very forcibly pointed out the disadvantages of what he styled "the abstract casuistry" of the drafters.³ The final text was modified and improved in this regard; nevertheless, though in less measure, it is open to the same criticism. A code drawn up with the constant care that it adjust itself to every detail of technical construction and to all the subtleties of dogmatic thought, perhaps never can wholly escape this reef. The very striking contrast in this respect between the Swiss Draft and the German Code has been pointed out by all commentators.⁴ We do not hesitate to regard this as a mark of superiority of the Swiss Federal legislation.

(2) *New Legal Theories*. — In the second place, as we have just observed, the French Civil Code is silent upon many theories elaborated in foreign countries, which the recent development of studies in comparative law has brought to the knowledge of France, and which, in certain respects, may appear preferable to the French traditional theories. That this is a defect from the purely scientific point of view many authors think, and we agree with them. But we must be careful not to exaggerate the practical importance of these defects and deficiencies. In fact, when we examine the application of the Code to-day, we find generally that the courts, by utilizing the traditional elements contained in the Code, have arrived at results very similar to the recent innovations of foreign law. No doubt some differences persist, made necessary by the difference itself in the principles upon which the reasoning rests. But these seem very small alongside the contrast presented by the abstract theories.

The Civil Code, for instance, does not mention the transfer-

¹ Cf., for example, *Hölder*, "Allgemeiner Teil des B. G. B.", pp. 15 *et seq.* Cf. *Saleilles*, "Introduction à l'étude du droit civil allemand", pp. 88 *et seq.*

² *Op. cit.*, p. 119.

³ "Entwurf", pp. 58 *et seq.*

⁴ For example, *Rümelin*, "Der Vorentwurf zu einem Schweizerischen Zivilgesetzbuch", p. 5; *Barazetti*, "Der Vorentwurf zum ersten und zweiten Teil des Schweizerischen Zivilgesetzbuchs" (Bern, 1898).

ability of the *liability* of a debt by assignment; but in the German Code this idea underlies the whole theory of the promise to pay the debt of a third party. There is absolute repugnance in the two principles. Nevertheless, by a skillful use of the novation of the debtor ("délégation passive"), and the promise for the benefit of a third party, which are traditional institutions of our national law, French courts and text writers have succeeded in almost completely concealing this omission of our legislation. Likewise it might not be impossible, by combining with our classical principles of co-ownership the idea of an implied partnership between co-owners, to arrive at most of the conclusions which are reached in practice under the German theory of joint ownership. So, also, there is scarcely an important result, based in German doctrine upon the theory of an engagement founded upon a unilateral declaration of will, which has not been explained in France without abandoning the classical ideas.

No doubt the theories that we have thus constructed in order to shape to new requirements old institutions that were devised for other purposes, are at times subtle, perhaps artificial, or overcharged with fictions. For this special reason, and not to introduce into practice any profound modification, certain authors consider that it would be very advantageous to introduce the foreign principles into the text of our Code. But it should be well understood that they do not regard it at all as involving a complete revision; they simply demand the addition to the complicated mechanism of our civil legislation, of a few new wheels, which would modify but little the aspect of the whole. Even those who (in agreement with the authors of the Swiss Draft) believe that the text-writer and judge have the right to fill the omissions of the law by an unfettered scope of judgment,¹ will be of the opinion that the improvement can generally be realized without the intervention of the legislator, by simply enlarging the methods of application.

(3) *Scientific Arrangement*. — As to the undeniable defects of the general construction and plan of the French Code, they would be certainly of the utmost seriousness in a scientific work. A doctrinal work which did not separate the general theory of jural acts from the theory of contracts; which brought together subject-matters as incongruous as the various Titles of the Third Book of the Civil Code; which in the same chapter dealt with two institutions as distinct as the acquirement and loss of rights by lapse of

¹ Draft, Swiss Civ. C. Art. 1, pars. 2, 3, *supra*, note 4.

time; would be deserving of the severest criticism. In a purely practical work these defects of method, which along with many others are noticeable in the Civil Code, have but a very lessened importance. It rarely happens that they are a source of obscurity or real difficulty for the judge. As to the commentaries, these need only reflect the influence of the defective plan of the Code if their authors surrender to that narrow method of exposition which dares not break away from the plan adopted by the legislator.

Upon this point also the Swiss Draft is instructive. While avoiding the defects in general construction which somewhat mar the French Code, its authors have remained well free of the scruples as to method that characterize the German Code. Renouncing the idea of drafting an introductory chapter laying down general principles, they have contented themselves with a "Preliminary Title" in twelve articles, similar, at least in external form, to the "Preliminary Title" of the French Code. In the same way they did not hesitate, in applying the Code, to refer back to the part upon obligations, for all matters relating to the general theory of jural acts.¹ They certainly perceived the objection which might be raised against this arrangement from the point of view of theory; but from the practical point of view it did not seem to them decisive.² Here also they have deviated from the German Code and approached the French.

Of all the criticisms, then, upon grounds of theory, that have been directed against the Code, not one seems to us to carry sufficient weight to render a revision of the whole necessary. At most the filling of some gaps and the improvement of a few details is desirable. The example of recent foreign codifications, which is often called upon when our Code is passed in judgment, does not seem to offer in this respect very decisive reasons for condemning it.

§ 3. **Economic and Sociological Criticisms.**—There remain to be considered the criticisms of an economic and social order. These, it must be confessed, seem, at first thought, infinitely more serious than the others.

¹ Draft, Swiss Civ. C., Art. 9: "The general rules of the Book upon Obligations apply by analogy to the other subjects of the Civil law."

² 'Message', pp. 9-10: "What would be the advantage of transferring the provisions relating to mistake from the general part of the law of obligations, where they are most frequently applied, to that of the Civil Code itself?" We should, moreover, note that legislation covering jural acts in general would have involved the revision of the text of the Federal Code of Obligations of 1881. Such a revision, at present under study, had then been postponed. This consideration influenced the decision of the authors of the Draft. (Cf. "Message", etc., *ibid.*; and Rümelin, "Der Vorentwurf zu einem Schw. C. G. B.", p. 4.)

They are of two sorts. Some are of general import; they reach to the spirit itself of the Code and to the essential social principles which dominate it throughout. Others, more specific, aim at definite classes of institutions; scarcely any part of the Code is completely exempt from them to-day. Both seem to us insufficient to justify a complete revision. This is what we shall endeavor briefly to show, by references also in this case to recent foreign codifications.

§ 4. **The Same; a Class Legislation.** — The reproach most often heard to-day, directed against the Code of 1804, chiefly by partisans of extreme social reforms, is that it is class legislation: — a Code of the middle classes, made exclusively by and for the well-to-do; a capitalist Code, forgetful of the rights and interests, and hostile to the development, of the working class. Supported by this criticism, the inadequacy of the provisions relating to the labor contract is pointed to; with such sparing rules are contrasted the abundance and minuteness of detail with regard to property; emphasis is laid upon the predilection with which the legislator of 1804 regulated all the contracts the purpose of which was the circulation or marketing of capital, such as sale, lease, associations for profit, etc.¹ And, in conclusion, a new Code is demanded which would be the sociological antithesis of the old. Warning signs are said to be seen in the recent legislative reforms and in certain present-day tendencies of judicial interpretation.²

The conclusion is dangerous, and its premise is false. The Civil Code is not a class legislation; it is the Code of a complete society. If, on judging it, we take into account in the first place the period when it was drafted, it in no wise appears as an instrument intended to exclude classes or to cause strife. It is true that the provisions concerning the labor contract occupy an insignificant portion; but it has very often been shown that this fact can in no manner be explained upon the basis of a want of regard for the non-propertyed classes. In the economic state of France in 1804 the very feeble growth of industry scarcely admitted a perception of all the legal difficulties to which the relations between employer and employee might give rise. The possibility of leaving the labor contract to the common law was admissible. The problem of the collective labor contract was not yet imagined. Consequently, the omission, which is emphasized to-day,

¹ As examples, cf. *Salvioli*, "I difetti sociali del Codice civile"; *Maxime Leroy*, "Le Code civil et le droit nouveau", bk. I.

² *Maxime Leroy*, *ibid.*, bk. II.

could by no means seem dangerous and offensive at the beginning of the last century.

It is true that economic and social conditions have changed. Problems which were not even perceived in 1804 have become vital, and urge themselves before all others upon the attention of the legislator. It is hardly possible longer to maintain that the common law suffices to regulate all the difficulties arising from the labor contract and all the problems concerning the condition of the laboring class.¹ Thus the omissions of 1804 become now a serious legislative deficiency. But, to remedy them, it is by no means necessary to remake the Code in its entirety. While social environment has changed, the Code has not for that reason become an obstacle to necessary progress. In this, as in everything else, it remains an instrument of a wonderful flexibility. Nothing in its text indicates a spirit hostile to the protection of labor. Article 1781, often cited to establish the contrary, and which provided that the employer should be believed upon his own affirmation as to the amount or the payment of wages, was mainly intended to end difficulties of proof; moreover, it was repealed in 1868.²

It would, then, be an easy matter to satisfy the deficiencies of our system, either by drafting (according to a plan already brought to the attention of the Chamber) a Code of Labor, which would exist alongside of the present Civil Code; or by introducing into the Civil Code (after the example of the German legislator) a Title devoted to the labor contract, in which would be regulated not only the contract with the individual but also the collective contract.³ But what is most important to note is that all this would in no wise imply the surrender of the general principles and essentials of our present law with regard to the regulation of property rights or to the theory of contracts. We have the example of the German and Swiss legislation as a corroboration, and rather by disregarding it would we risk making the Code what it never was: an instrument of caste and prejudice.

§ 5. **The Same; Old Concepts of Liberty and Equality.** — It is true that criticism may take another form. The Civil Code, it may be said, is an obstacle to the *socialization* of the law, less by the

¹ *Glasson*, "Le Code civil et la question ouvrière" (1886).

² *Id.*, pp. 16 *et seq.*

³ The German Code devotes twenty-one Articles (Arts. 631-651) to the contract for work ("Werkvertrag") which it distinguishes from the labor contract ("Dienstvertrag"), Arts. 611-630. It is upon this part of the Swiss Federal Code of Obligations that the most radical modifications of the text of 1881 will bear. Cf. "Journal de Genève" (Oct. 4 and 9, 1904).

precise provisions of its text than by the general spirit which pervades it. Essentially individualistic, it rests entirely upon two social ideas, handed down from the Revolution but profoundly transformed within a century: the idea of liberty and the idea of equality.

The principle of individual liberty, which seemed absolute to the minds of the Constitutional Assembly and which came to be limited only by the necessity of maintaining public order, is weakening in contemporary social philosophy, until it is on the point of almost complete disappearance in the doctrine of socialism.¹ Certain critics of the Civil Code declare that "the individual has no personal and inherent right to the liberty of acquiring and contracting." "He possesses this right," they say, "only as a member of society. . . . Liberty should be accorded only in the measure in which it proves to serve collective interests."² It is the reverse of the classic formula. In 1804 it was said that the individual was, in general, free, save in the case where the exercise of such freedom was against public policy. To-day it is said that, in general, the individual is free only in the case where such freedom is useful to common interests.

The same transformation has taken place in the idea of equality. Equality before the law, as conceived in the Civil Code, was, in Menger's phrase, "a caricature of equality."³ According to Salvioli, who in this respect considers the Code as the heir of the Roman law, "equality in the Roman conception required that the law should not artificially favor one human force to the detriment of another. That inequality which flowed naturally from the difference of such forces did not offend the juridical sense of the Romans. But it does offend ours, for, as the world progresses, our sense of justice becomes more acute and our sense of equality finer. It is by our effort to consider and to treat as equal persons who are not equal that the true inequality is created. Our jurists imagine that they are fulfilling the right of equality when they establish equality of right; it is an illusion remote from the reality."⁴ Thus, while the classic concept of equality made the legislator a passive spectator of economic and social inequalities, the socialist concept commands him to intervene to restore the equilibrium of human forces, by favoring those who are naturally

¹ Cf. *Menger*, "L'Etat socialiste" (Fr. trans.), pp. 85 *et seq.*

² *Salvioli*, *op. cit.*, p. 36.

³ *Menger*, *op. cit.* (Fr. trans.), p. 91, and also bk. I, chap. XI.

⁴ *Salvioli*, *op. cit.*, pp. 12, 13.

weak, to the detriment of those who are naturally strong. For equality before the law is substituted equality created artificially by law.

These are extreme formulæ which even the boldest legislation has never concretely applied and whose dangers have been repeatedly pointed out. Carried to their ultimate consequences, these principles would lead in private law to results much more serious than the revision of the Civil Code: they would destroy civil law itself. By making the arm of the State felt in all fields of private economic activity, administrative and penal law would everywhere be substituted for private law. Menger foresees very clearly this revolution in organization.¹ We need hardly say that the example of those neighboring legislations most infused with the new tendencies radically condemns it.

(1) *The Effects of Solidarity.* — However, dismissing definitely these exaggerations, we have to recognize that, in the average, present-day legal sentiment, the selfish individualism of 1804 is gradually weakening in contact with the philosophy of solidarity. To this extent it may truthfully be said that we no longer conceive liberty and equality as did the framers of the Code. If we uphold the elemental right of the individual to the free exercise of his forces, we admit at the same time, in a much broader sense than the classic doctrine, the idea of a social end to which those forces must converge. If we refuse to impose upon the legislator the impossible task of artificially levelling inequalities, we nevertheless recognize his duty to protect the weak; we say that to a greater economic power correspond broader obligations. Upon these two points the German Civil Code, and even more the Draft of the Swiss Code, show us the way to-day. So understood, it would seem that the socialization of law ought to enlist the approval of the large majority of French jurists.

(2) *Admission of New Principles through Old Texts.* — The discord is, then, audible between the underlying principles of the drafters of the Code and contemporary ideas. But this discord, as we have defined it, entails by no means a complete rewriting.

It has been said that certain texts of the Code, which are very general and pliable, might, by a courageous application become (in Jhering's expression) "the entering wedge" of the new principles. Such are, for example, Article 6 and those provisions which declare void all agreements contrary to public policy and good

¹ "L'Etat socialiste" (Fr. trans.), bk. II, chap. xvi, and *ibid.*, introd. by *Andler*, pp. xx-xxi.

morals, without however defining those two notions so vague in themselves. Such provisions permit the judge to follow the modifications which an evolution in ideas causes in the two concepts, and to extend his protecting interference in proportion to their expansion. Such again is Article 1382, which recent applications have succeeded in harmonizing with theories of civil liability far removed from the classical doctrine.¹ As to the adaptation of the Code to modern social principles, we may here remark (in a line with what has just been said concerning its adjustment to scientific ideas) that the legislator has very wisely avoided those general definitions which soon become an obstacle to progress; and his silence, on many points, has left a free field to interpretation. On occasion, too, principles of law, scarcely outlined in the texts, have become the origin of whole series of judge-made creations; and the list has not yet been closed. Thus, Article 1121, which regulates, though very imperfectly, the promise for the benefit of a third party, has already enabled the courts to validate and work out certain varieties of contracts of insurance and of mutual aid. There is reason to believe that the usefulness of this Article is not yet terminated; it represents in the present Code an agency of social progress beyond appreciation.²

(3) *Admission of Principles without Any Foundation in the Texts.*— Alongside the improvements thus founded upon actual texts of the Code, still others (of which foreign legislations have already offered us an example for which in France the support of express texts is wanting) can, nevertheless, be introduced without legislative reform. The German Code and the Swiss Draft have expressly sanctioned the theory of the misuse of right, which marks among modern judicial principles one of the most important stages in the "socialization" of law.³ This doctrine admits that subjective

¹ Cf. *Charmont*, "La socialisation du droit", p. 24. Certain theoreticians of the socialist party have even maintained that Art. 1382 supplies a legal foundation to their claims. *Emmanuel Lévy*, in "Revue trimestrielle de Droit civil" (1903), p. 96; *Jaurès*, "Études socialistes", p. 162. The generality of Art. 6, especially with respect to public policy, seemed excessive to the German legislator. In view of the claims of the socialist party it seemed to him dangerous to allow the setting aside of an act in law to be based upon such a vague and inadequately defined notion. Thus Art. 138, par. 1 of the German Civ. C. sets aside only those jural acts which are contrary to *moral justice*, without mentioning *public policy*. Cf. *Saleilles*, "Déclaration de volonté", pp. 251 *et seq.*

² *Virante*, "L'influenza del socialismo nel diritto privato", pp. 19, 20.

³ Draft, Swiss Civ. C., Art. 3: "Whoever manifestly misuses his right shall enjoy no legal protection;" [Civ. C., Art. 2, par. 2. — *TRANSL.*]; Draft, Art. 670: "Whoever is injured or threatened with injury by the misuse which an owner makes of his right, has an action against him to compel him to restore things to their previous state, or to take proper measures

rights may not be exercised with absolute impunity; that every right is recognized as belonging to the individual for the attainment of a certain social object; and that the possessor of a right, by turning it away from the end which justifies it, commits a wrong and makes himself liable.¹ It has been very justly observed that this implies a profound modification in the classic principle of liberty in the exercise of rights. Those legislations which sanction the new theory introduce, in the words of Saleilles,² "the truly social conception of subjective right." Now, to introduce the new theory into the application of the French Code, it suffices to accept this "social conception", such as the German and Swiss legislators have admitted it; and that may be accomplished with us without reform of the text, for the authors of the French Code, by very wisely refraining from defining subjective right, left full freedom upon the subject to that evolution which legal writers might effect. Our courts in the last fifteen years, moreover, have not waited for legislative directions to apply often the theory sanctioned by the foreign codes.³

(4) *Changes requiring Legislation.*—We could go yet further in the direction indicated by recent foreign codifications; but here the intervention of the legislation would become necessary. Article 138 of the German Civil Code, the result of long discussion and legislative evolution, sets aside as contrary to good morals any jural act "whereby a person profiting by the difficulties, indiscretion or inexperience of another, causes to be promised or granted to himself or to a third party, for a consideration, pecuniary advantages which exceed the value of the consideration to such an extent that, having regard to the circumstances, the disproportion is

to remove the danger, without losing his right to damages"; [Civ. C., Art. 679. — TRANSL.] The Preliminary Draft of 1900, Art. 644, applied the notion of the misuse of a right only to the right of property. While preserving it in Art. 670 [these Articles of the Draft and Code are in fact limited to real estate. — TRANSL.] the Draft of 1904 by Art. 3 (Civ. C., Art. 2, par. 2), generalizes the principle. (Cf. 'Message', p. 14: "Practical considerations militate in favor of this formula, expressed in general terms. By it we have created a sort of extraordinary recourse, which should assure respect for justice to the advantage of those who may suffer from a manifest misuse of a right by a third party, whenever ordinary means are inadequate to protect them.")

Cf. the German Civ. C., Arts. 226 and 826, and the note on these texts accompanying Art. 226 in the translation of the German Civ. C. published by the Comité de Législation étrangère; also *Saleilles*, "Théorie générale de l'obligation d'après le premier projet de Code civil pour l'Empire d'Allemagne" (2d ed.), pp. 369-370.

¹ Cf. *Porcherot*, "L'abus du droit" (thesis, Dijon, 1901), and the remarks of *Charmont* in "Revue trimestrielle de Droit civil" (1902).

² *Saleilles*, "Théorie générale de l'obligation", p. 370, no. 1.

³ *Porcherot*, *op. cit.*, for analysis of the decisions.

obvious." Such a provision will quite frequently enable the weak, when victims of another's exploitation, to be protected, where the classic French theories of want of consent or of inequitable price would leave the court powerless.¹ Another interesting rule is found in Article 343 of the German Code, where, in the special subject of penal clauses, a very remarkable tendency to enlarge the protective powers of the judge is apparent. "If a forfeited penalty," the text says, "is disproportionately high, it may be reduced to a reasonable amount by judicial decree obtained by the debtor. In the determination of reasonableness every legitimate interest of the creditor, not merely his property interest, shall be taken into consideration. . . ."² The practical import of this power of mitigation becomes evident in its application, for example, to cases of loss or reduction of wages imposed as penalties by the rules of workshops. This is of course only a tendency, but it is found again, in a more general and somewhat vague manner, in the Swiss Draft. Indeed, the considerable enlargement of the courts' discretionary and protective powers has justly been pointed out as one of the essential characteristics of this legislative work.³ Some critics even see a certain excess in this latitude.⁴ A reform of the French Code, introducing all the innovations desirable, and completely harmonizing our law with the most exacting demands of the average legal mind, could be realized with the utmost facility by retouching a few details.

§ 6. **Criticism of Specific Revisions.** — We arrive at the same conclusion when we turn from the examination of the general ideas that have governed and inspired the Code to the criticism directed against specific passages. Upon none of the institutions regulated by its text has it escaped criticism; to recall them here

¹ Cf. the note of the French translation by Comité de Législation étrangère, and the very important study of *Saleilles*, in "Déclaration de volonté", pp. 251-302.

² Cf. note of the French translation *supra*, note 42; Swiss Fed. C. of Oblig., Art. 182. Concerning the moderating power of the judge in the matter of penal clauses, cf. the interesting observations of *Hugueney*, "L'idée de peine privée en droit contemporain" (thesis, Dijon, 1904), pp. 186 *et seq.*

³ Cf. examples of the very broad powers of discretion accorded the judge by the Swiss Draft in its Art. 29 with regard to damages for an unlawful act affecting one's personal status (Civ. C., Art. 28); Art. 102, on breach of promise to marry (Civ. C., Art. 93); Art. 158, on redress to the innocent party of injury resulting from divorce (Civ. C., Art. 151); Art. 699, on expropriation of waters yielding to their owner benefits small as compared to those resulting from their public exploitation (Civ. C., Art. 711), etc. Cf. upon the character of the Swiss Draft, *Rümelin*, "Der Vorentwurf zu einem Schweizerischen C. G. B.", pp. 6 *et seq.*

⁴ *Rümelin*, *ibid.*, pp. 8, 9.

would be almost superfluous. With regard to the family, demand is heard for greater independence for the wife, a curtailment of the paternal power, a betterment of the condition of the natural child, a reform of the laws of succession. As to the right of property, objection is raised to its absolute, exclusive, and too strictly individualistic character.¹ In the law of contracts the very principle of the autonomy of the will is attacked upon the grounds that it is merely a particular application of the classic conception of liberty, which aggravates the condition of the weak by favoring the strong.

From this new point of view also, the application of the comparative method leads to like results. When the Civil Code is placed alongside recent codifications, it becomes apparent that the boldest reforms that have seemed realizable in practice, do not involve, upon any of the points we have mentioned, a radical abandonment of the fundamental principles of the Code. Let us glance at the Swiss Draft, the special interest of which in this matter we already know. We shall see that, imbued as it is with the "social" spirit, it preserves (like the French Code), as unalterable principles, the idea of the family, based upon marriage and presided over by a directing head; private property with its classic attributes; and the principle of liberty of contract. Experience shows, then, that in spite of all criticisms, these ideas remain the necessary foundation of a private law that pretends to practical usefulness.

(1) *The Married Woman*. — A few rapid references to the Swiss Draft will confirm our judgment. Upon the question, so eagerly discussed to-day, of the condition of the married woman, the Draft sets out from a principle which the most radical feminist would not reject.² "We create for the married women," says the "Message" of May 28, 1904, "a position of independence in accord with our customs."³ Applying this idea, the Draft suppresses, by merely ignoring it, the incapacity of woman; but this incapacity French jurists now unite in condemning, by reason either of its ambiguous principle or of the defective treatment it has received in the Civil Code. "After the abolition of guardianship based upon sex and the restoration of civil capacity to single women of age, it would not seem possible," says very justly the 'Message', "that this

¹ We purposely omit all the criticisms directed against our system of publicity in conveyancing, and against our mortgage system. In these matters every one agrees in demanding a reform.

² Draft, Arts. 166-173 (Civ. C., Arts. 161-168).

³ P. 26.

capacity should be denied to married women.”¹ But the authors of the Draft, having thus laid down the principle, proceeded at once to restrain themselves from exaggeration in its practical application. “The civil capacity of the wife,” they say, “is limited on the one hand by the interests of the union, on the other by the system of marital property;”² to-day we must “establish the solidarity of interests of the wife with those of the marriage union; since the abolition of a guardianship based upon sex, the task of the modern legislator consists simply in defining with greater precision the conditions of this solidarity.”³

Thus, after all, the concessions to the feminist doctrines are found to be limited by a very just understanding of the nature of the marriage union. The wife may exercise a profession or an industry; but the husband has the power to prevent the exercise of this right “if it would become prejudicial or dangerous to their union,” and such refusal is subject to annulment by the judge if unjustified.⁴ Should the husband neglect his duties toward his wife and children, the debtors of the husband, and especially his employers, may be authorized to pay to the wife in his stead; but this authorization may be granted only by the judge upon petition of the injured spouse.⁵ The law readily admits the separation of estates, either upon motion of the court in case of bankruptcy of one of the spouses,⁶ or upon petition of the wife,⁷ or even upon request of the husband or a creditor.⁸ It adopts the principle of the partial separation of estates, and the property thus held is subject, regardless of the matrimonial community system, to the rules of the separation of estates.⁹ But it adopts as the common law rule the system of community of estates. Disregarding details (which are of course open to differences of opinion) and considering only the main lines, we see that in this respect the “socialization” of law has not gone far beyond certain tendencies, already very marked in France, which find legal recognition in the decisions of the courts or in proposed legislation.

(2) *Protection of Children.* — The same may be said of the provisions of the Swiss Draft concerning the paternal power and the

¹ P. 26.² *Ibid.*, p. 27.³ *Ibid.*, p. 27.⁴ Arts. 174–175 (Civ. C., Art. 167).⁵ Art. 179 (Civ. C., Art. 171).⁶ Art. 188 (Civ. C., Art. 182).⁷ Art. 189 (Civ. C., Art. 183).⁸ Arts. 190–191 (Civ. C., Arts. 184, 185).⁹ Arts. 197–200 (Civ. C., Arts. 190–193). Cf., on this remarkable principle of the Swiss Draft, and on the comparison that may be drawn between this and the similar theory of the German Civ. C., *Gény* in “Bulletin de la Société d’Etudes législatives” (1902).

protection of the child. The Articles¹ governing these subjects hardly do more than extend and render more flexible the French law of 1889 upon forfeiture of the paternal power, by increasing (in accord with a tendency already pointed out) the public guardian's power of interference and the range of his discretion.² Without declaring a forfeiture of the paternal power, the public guardian may withdraw the care of the children from the father and the mother and may place them in an educational institution or in a family, when their physical or intellectual development is endangered or when they are neglected or abused.³ By a still more radical rule, he may declare the parents deprived of the paternal power, in case of the remarriage of the father or the mother,⁴ or in the exceptionally serious circumstances intentionally defined by Article 296 in very broad terms.⁵ "It is to be hoped," says the 'Message', "that the public guardian will act with enough circumspection not to make it necessary to define his powers more closely. A more explicit definition would entail many difficulties in other ways, which we now escape by the latitude which we have left to governmental intervention. Moreover, parents may appeal from all arbitrary decisions against them."⁶ In all this there is still nothing in disagreement with the fundamental principles of the French civil law. The Swiss Draft goes farther, but it travels the same road.

(3) *Illegitimate Children*. — The limits of this essay oblige us to call attention more rapidly to some other examples, the examination of which leads to the same conclusions. The Swiss Draft protects the natural child much better than the French Code, with regard to proof of paternity,⁷ the effects of such proof upon the parents,⁸ and rights of succession.⁹ But it studiously maintains the superiority of the lawful family over the natural family,

¹ Arts. 294 *et seq.* (Civ. C., Arts. 297 *et seq.*).

² The organization of public guardianship has been left by the Draft of the Federal Code to cantonal legislation. Its function is similar to that of the "Guardianship Court" in Germany.

³ Art. 295 (Civ. C., Art. 284).

⁴ Art. 298 (Civ. C., Art. 286).

⁵ Art. 296 (Civ. C., Art. 285). The Code says: "If the father and mother are without capacity to exercise the paternal authority, or are under suspension of civil rights, or guilty of grave abuse of authority or of gross negligence, they shall be deprived of their right by the public guardian."

⁶ P. 37.

⁷ Concerning the action to establish paternity, admitted by the Draft, *cf.* Arts. 316 *et seq.* (Civ. C., Arts. 305 *et seq.*).

⁸ With regard to the mother, *cf.* Arts. 312, 469, and 332; to the father, Arts. 328 and 332, 322-327 (Civ. C., respectively Arts. 302, 461, 325, and 323, 325, 317-322).

⁹ Art. 469 (Civ. C., Art. 461).

and it avoids the idealism which in this respect imperilled the law of succession of the Revolutionary Convention. The final draft has remained true to the principle, so broad and yet so wise, proposed by Professor Eugen Huber in his report upon the preliminary draft: "It would be a flagrant inconsistency," he said, "to grant the natural child equality of rights in general and at the same time to deprive him of the rights attaching to blood ties. These reasons should oblige us to create in favor of the natural child a legal status, the inferiority of which shall not rest upon the fact of illegitimate birth, but shall result from other considerations, such as protection due to marriage and to legitimate children."¹

(4) *Succession*. — This same tendency is evident in the regulation of the system of inheritance. The Swiss Draft recognizes the disadvantages that arise from conferring a right of succession upon very distant relatives.² Radically different in this respect from the French Code, it limits the right of inheritance properly so called to the grandparents,³ granting to the great-grandparents, great-uncles, and great-aunts only a life interest.⁴ But with this exception, it accepts principles very analogous to our own. It establishes liberty of disposing by will, combining it with the principle of the compulsory reserve for the heirs. It even shows itself more solicitous of the family than the French Code, by classing brothers and sisters among the heirs sharing in the reserve.⁵ We should add, however, that the Draft sanctions the disinheritance, for definite causes and in the cases expressly defined by law, of those entitled to benefit in the reserve.⁶

(5) *Property*. — Partial concessions to the new principles and maintenance of the essentials of the basic principles: such are what we see when we turn to the theory of property and the regulation which it has received at the hands of the authors of the Swiss Draft. The definition in the French Code has been often criticized: "Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way contrary to law or regulations."⁷ But this definition, as interpreted to-day, is not a whit more individualistic than that of the Swiss Draft: "The owner of a thing has the right to do with it

¹ Cf. 'Message', p. 40.

² *Ibid.*, p. 49.

³ Cf. the diagrammatic table of relationship, annexed to the official edition of the Draft.

⁴ Cf. Arts. 465-469 and app. II of the Draft.

⁵ Arts. 478-479 (Civ. C., Arts. 471, 472).

⁶ Arts. 482-484 (Civ. C., Arts., 477-479).

⁷ Art. 544, trans. by *Cachard* (London, 1895).

as he pleases, within the limits set by the law.”¹ When these two definitions are combined with the theory of the misuse of a right, they lead to an almost complete identity of principles. It matters little that in certain particular cases the Swiss legislator later limits the rights of the owner in the interests of society far more strictly than French law has ever done. These limitations, which are especially concerned with the ownership of water courses, springs, and with the grants of water rights, are justified by the special conditions affecting these matters and not by any general theory of the rights of society over the objects of ownership.²

(6) *Contracts*. — The Swiss Draft does not touch the theory of contracts. The Confederation will continue, after the adoption of the Federal Civil Code, to be governed provisionally in this matter by the Federal Code of Obligations of 1881, the revision of which is already being undertaken. But it is already evident that, in this revision, the French principle of liberty of contract will be regarded as unassailable, and that the rule of the autonomy of the will is to be taken as point of departure, as was done in the German Code. No doubt, after the example set by the German legislator, its application will be limited by a certain judicial power of supervision; no doubt the rule will not be accepted in its strictly classic sense. It will not be said that, outside of questions of public policy, all private rights, especially those based upon jural acts affecting property, have their basis in a presumed intention of the individual.³ But, while recognizing that subjective right has no purely individual foundation, the rule of liberty of contract will, as in the German Civil Code, be carefully preserved.⁴ And thus, once again, the old principles of the French Code will be faithfully observed.

¹ Art. 635 (Civ. C., Art. 641 is identical in sense).

² Cf. Art. 699, “The owner of springs, water sources or brooks which have no utility to him, or a utility small in proportion to their value, is bound, upon full compensation, to yield them up to public use for drinking purposes, water supply or other works of public interest.” (Civ. C., Art. 691.) Cf. Arts. 933 and 935, granting to the Confederation a preferential right in the matter of water concessions. Cf. besides Arts. 693, 696, 698 (Civ. C., Arts. 705, 708, 710) and, from another point of view, Art. 680 (Civ. C., Art. 691) according to which the owner is obliged to allow, upon payment of full compensation, the construction across his land of aqueducts, drains, gas-pipes, electric conduits above or below ground, — provided, at least, that it is impossible to carry out such work without utilizing his property. Cf. also Arts. 681–682 (Civ. C., Arts. 692–693).

³ Concerning the theory of the autonomy of the will in the German Civ. C., cf. *Saleilles*, “Introduction à l’Étude du droit civil allemand”, pp. 44 *et seq.* For criticism of the classic theory, cf. particularly *Duguit*, “L’État, le Droit objectif et la loi positive”, pp. 140 *et seq.*

⁴ Upon the importance of this rule in the German C., cf. *Saleilles*, *op. cit.*, p. 45.

§ 7. **Conclusion.** — “It is better to preserve what it is not necessary to destroy.”¹ This common-sense maxim which the author of the Preliminary Report on the French Civil Code drew as a lesson from the example of the abortive projects of the Revolution, should, after a century, serve as the guide for those now engaged in the serious and dangerous problem of the revision of the French Code. That this Code is to-day one of the oldest codes in the world is of little matter, if the examples of junior legislations reveal to us the vitality of its essential principles; if the re-awakened science of interpretation is able to set the life-giving sap circulating within the ancient trunk. This century-old masterpiece, whose success was once assured by its moderation, its respect for French traditions, and its spirit of compromise, may perhaps yet enjoy a long life, if a few improvements in detail remedy certain defects, and if authors and judges pursue their task of progress. Private law in France needs no new code: its future depends upon the broadening and strengthening of our methods.

¹ *Fenet*, Vol. I, p. 481.

CHAPTER VIII

THE ITALIAN CIVIL CODE OF 1868

BY ICILIO VANNI¹

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| § 1. The Motives for Codification.
§ 2. International Status as regulated in the Code.
§ 3. Ecclesiastical Relations as regulated in the Code.
§ 4. Law of Persons as regulated in the Code. | § 5. Property under the Code.
§ 6. Contract under the Code.
§ 7. The Code as a National Achievement. |
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§ 1. **The Motives for Codification.** — Legislative unity in Italy came inevitably as a corollary of political unity. By merging all interests and activities, national codification was destined to solidify political union, and in a large measure to establish that spiritual bond between law and government without which a material bond is apparent rather than real.

Yesterday Italy was a divided and subject people. To-day her sons, free and united, are brothers both in nationality and in law. Justice, too, called for uniformity; for civil equality had in fact been lost in the aimless labyrinth of codes, laws, and customs then governing in various ways the most essential functions of society. Pisanelli declared that this diversity made Italians confused and doubtful about their own law, so that they seemed almost like foreigners to each other.² He might have added that the law of an independent people could not remain as it then was, largely in

¹ [This Chapter is translated, with a few omissions, from an address read before the University of Perugia, June, 1878, by ICILIO VANNI, printed in his "Saggi di filosofia sociale e giuridica" (Bologna, 1906, p. 128; Zanichelli), under the title "I progressi della legislazione civile in Italia dopo la rivoluzione."

The author (1855-1903) was professor of law successively at the Universities of Perugia, Pavia, Parma, Bologna, and Rome. His chief work was in the philosophy of law; but among his other works may be noted: "Gli studi di H. S. Maine" (1892), and "I giuristi della scuola storica" etc. (1885). His "Lezioni di filosofia del diritto" (3d ed., 1908), is translated into English as Vol. VI of the "Modern Legal Philosophy Series" (Boston); the editorial preface to that volume furnishes a full critique of his work. — Ed.]

² "Dei progressi del diritto civile in Italia nel secolo XIX" (Milan, 1872).

codes wherein survived the old spirit of despotism in every line, with principles that were in flagrant violation of the spirit of the new political order. Private law was too much influenced by political law to remain unaltered while the fundamental principles of the latter were breaking down. Alike in the nation's aspirations, convictions, manners, and needs, great advances had taken place. To this a legal expression needed to be given, in a code which would bring into adjustment the actual conditions of society over which it was called to preside. I shall explain briefly what this forward movement was.

Future generations writing the history of the 1800's will, I think, assign as its chief characteristic a certain tendency towards *universality*. We are witnessing, but on a far grander scale and more consciously, almost a repetition of that phenomenon that effected so profound a revolution in the law of Rome, the "*jus gentium*."

In the first place, the rapid extension of the material interchange of products and the intellectual exchange of ideas and opinions; the wonderful development of trade and credit; the commercial treaties that have broken down the prohibitive and protectionist walls, — harmful alike to the economic and intellectual life of nations, which the law of solidarity designed for true brotherhood; the increased facility of international relations; the new principles in force in international law; a foreign policy more unselfish and less in sympathy with the idea of inevitable antagonism between nations; and, lastly, a loftier conception of man and humanity that has lent enormous impulse to the idea of a "*communio juris*" among nations — such facts as these have produced the immediate result that the civil law of the various countries (especially with regard to judicial practice) tends toward a certain character of equality, so that it may be called almost international. This is logical. Solidarity means community of life, and in the legal sphere community of life is the reason for equality.

Secondly, the revolution in Italian public law, the triumph of the principle of liberty of conscience, and the deliverance of the State from all ecclesiastical interference, were bound to lead to the secularization of the law. Law was bound to be released from the meshes of a net where an unnatural alliance between civil and religious authority had held it fast, often making it a pious tool for the salvation of souls. The two cardinal principles, equality before the law and personal liberty — sacred conquests of the political revolution — were naturally to influence much of the law of persons.

And, lastly, there was need to readjust the law to the economic revolution. Italy was to progress steadily along the path of reform towards which the political economy of Adam Smith (through the eloquence of Pellegrino Rossi) had directed the attention of legislation. Enactments that had hampered the circulation of personal property had to be repealed, and those that had encouraged it had to be strengthened.

Thus the progress, brought about by the political revolution and calling for legal expression on the eve of codification, covered in its aim international solidarity, the secularization of the law, the autonomy of the individual, and the organization of the law of property or economic law upon the basis of liberty.

Has the Civil Code of 1868 satisfied all these demands? Has it met the justifiable hopes of Italian science and civilization? To reply satisfactorily to so serious and difficult a question we should have to examine the whole Code in detail and elaborate a comparative study of it; we should have to turn to its sources in prior codes and laws, and note the survivals of the past and the innovations that have been introduced, weighing them both from the point of view of history and of actual conditions so as to determine whether other and better rules ought to and can be added. This is clearly impossible in the time at our disposal, and I shall therefore merely summarize the salient points of progress reflected in the Code. By a consideration of their history and of present conditions I may be able to point out the way of future progress.

§ 2. **International Status as regulated in the Code.** — First, let us consider the *international relations of individuals*.

Of itself it marks a great advance to have satisfied the want, so deplored by science, in the legal systems of other countries, by codifying this subject. Principles of a very general character were compressed into a few peremptory rules governing the conflict of laws in international relations. These rules cover the status and capacity of persons, family relations, the ownership of personal and real property, the substance and form of acts "inter vivos" and of wills, intestacy, the substance, proof and effect of contracts, jurisdiction, procedure, and the execution of judgments. But if we consider, too, the nature itself of these rules, the Italian legislator appears deserving of still greater praise, for he has wisely, generously, frankly, and directly moved toward a liberal reform and so has solemnly sanctioned all the logical consequences of the ideal of a *community* of law amongst nations.

The extension of the principle of nationality ("personal status")

even to the law of inheritance marked in legal history the triumph of those doctrines so warmly defended by modern German jurists. With the exception of the Belgian Code of 1864 it was a triumph unprecedented in modern codification. Whether because the law of inheritance may be regarded as an aspect of family law, or whether because the estate in its unity ("universum jus") may be said to represent the person of the deceased, it has at any rate been shown that the law of inheritance is essentially governed by the principle of personal status. Out of the spiritual unity of the family and the theoretical unity of the deceased's estate arises therefore the impossibility of the law's conceiving a division of the estate and of regulating its distribution differently according to the situs of the property,—as in fact happens under the rule of "*lex rei sitae*" or "*tot hereditates quot territoriae*." It was no overstatement for Pisanelli, when he reported the draft of the Code, to say that modern civilization would feel a deep indebtedness to Italian law by reason of the new rule; for, as it operated without dependence upon international reciprocity, it would serve as a worthy example and stimulus to other nations. Such a principle, added the celebrated Minister, nobly epitomized the temper and character of the new legislation.

Yet, like the other rules commanding recourse to personal status, this one has not escaped severe criticism for having made nationality rather than domicile the criterion. Most authors, preferring the latter, maintain that a person takes on his distinctive and inherent qualities where he is domiciled, because of a natural and usual relationship between the domicile and the activities of the individual.¹ I cannot, at least so unreservedly, approve this criticism, because I think that this problem is far from having been scientifically solved. On the other hand, I regret very much that, though illogical and unanimously condemned by theory, the old rule "*mobilia sequuntur personam*", has been retained instead of assimilating (with necessary limitations) personal property to real property and subjecting it to the law of the locality where situated.²

¹ Cf. a restatement of the criticism, with the usual arguments, by *Gabba*, "Gli articoli 6-12 del Titolo Preliminare del Codice civile italiano" (Florence, 1868). The opposite doctrine has its adherents; cf. notably: *Brocher*, "Théorie du droit international privé", in "Revue de droit international et de législation comparée" (1881), nos. III and IV; *Id.* (1873), no. III; *Laurent*, "Principes du droit civil", no. 87; *Lomonaco*, "Diritto civile internazionale", I, 3.

² Cf. *Savigny*, "Sistema del diritto romano", § 366; Eng. trans. by *William Guthrie*, "Private International Law and the Retrospective Operation of Statutes" (2d ed., Edinburgh, 1880), § 366; *von Bar*, "Das internationale Privatrecht", pp. 200 *et seq.*; *Gabba*, *loc. cit.*

However, the provision by which foreigners have been placed on the same level as nationals in respect to the enjoyment and exercise of civil rights without obligation of any sort as to residence has been unreservedly commended. I do not know whether that reform was primarily a principle of justice or an act of generosity: of justice, because private rights are an attribute of man as man, not by reason of his citizenship, but by reason of his own nature; of generosity, because, by discarding diplomatic reciprocity, Italy was first among nations to prove to the civilized world her faith in the triumph of international justice and in the solidarity of the human family. Truly it was remarkable that a people who but the day before had been looked upon as a stranger amongst nations should, by almost its first independent act, invoke the great principles of the new law of Europe.

§ 3. **Ecclesiastical Relations as regulated in the Code.** — When we turn now to the reforms touching the emancipation of the law from all *ecclesiastical elements*, we need recall only the principal and most far-reaching of them, namely the secularization of marriage.

The Church, profiting by the ascendancy which it had gained in the darkness of the Middle Ages, and by its power to preside, as minister of the sacraments, at birth, marriage, and death, had gradually come, through the toleration of civil authority, to absorb into the formality of the rite the entire civil element of marriage resulting from its contractual character. Later it succeeded in taking marriage over into its exclusive jurisdiction, and, on the ground of their being kindred matter, usurped jurisdiction over all questions of law relating to the three main stages in the civil life of the individual. By these means (and their importance is not yet generally recognized) the Church contrived to dominate civil society and to assure its own supremacy over the State. But the modern State emerged from its struggle with the Church fully possessed of a legal consciousness and tainted by that original sin of freedom of thought. Vigorously and successfully it commenced to reassert its claims.

The history of civil marriage in Italy is well known. It was introduced through the French conquest, and was accepted without opposition by the people, though attacked by the clergy. Because of its origin it fell under the dislike of the Restoration government, by whose unwise reactionary policy it was almost openly abolished in all the Italian States. Later, when Liberation came, it was tried with favorable results in this very province of Umbria, so

long a theocracy. It appeared in all the government and parliamentary drafts of the new Code; its final adoption solemnly vindicated the claim of the freedom of conscience and of civil authority over this fundamental act in the life of civilized society.

There is no need to dwell here upon the justification, importance, and salutary effects of something that may be regarded as common knowledge. I shall not, therefore, stop to controvert an opinion which found expression in a counter-proposal introduced by Representatives Andreucci and Georgini. This opinion, which has been defended even by able and otherwise very liberal jurists, holds that the State's assumption of an exclusive right to give legal recognition and life to marriage is a usurpation and restraint of the liberty of the individual. In his learned and eloquent Report to the Senate, Vigliani has already answered this contention. It seems more opportune for me to point out two serious defects of the Code in this matter which are a clear step backward from the Napoleonic legislation and the needs of Italy.

Individual liberty was thought to have been respected by abandoning the prohibition against celebrating the church ceremony *prior* to the civil marriage and by the punishment of the priest who thus performed the rite, — provisions which exist in the French Criminal Code. The intention was to place the parties upon their own responsibility, trusting that the moral sentiment of the people, the interest of the contracting parties and of the family, as well as the good intentions of the Church, would be sufficient guaranty of compliance with the civil law. At least it was thought premature in the then state of affairs to establish for a theoretical evil penalties that might prove offensive to religious liberty.

But the theoretical evil became a fact shamefully real and present. From every part of Italy arises a cry of sorrow and indignation at the appalling figures that prove the continual and flagrant violation of the law and of the authority of the State. Everywhere we see the demoralizing rivalry of the Church ceremony, "that secondary rite so suited to the easy conscience of the pseudo-gentleman", amounting to concubinage lightly veiled by an apparent legality. Witness the immorality that is abroad, in the desertions and bigamy that are facilitated and practised with impunity; likewise the desperate future of innumerable unlawful alliances, so often doomed to misery and dishonor. Behind how many of these figures lies a long history, some pitiful tragedy, ending in suicide, prison, the reformatory, or the brothel! In the single year of 1877, in the province of Rome alone, it was estimated that as

against 4301 marriages celebrated with the double ceremony, no less than 2000 marriages were purely religious. The clamor of public conscience was heard in legislative and executive chambers. As far back as 1873 Minister Vigliani presented a law aimed at the suppression of the most serious of these abuses, — the same Vigliani (let it be said to his credit) who had opposed in the Senate the adoption of a penal provision. Nor did the legal profession shirk its part in this labor. Eminent jurists and authors,¹ with learning and energy worthy of the cause, raised indignant voices to support and justify the urgent necessity of such a provision and to rebut the legal objections with which Carrara attacked it.²

The argument of these authorities can, I think, be thus summarized. In the first place, the State is under the obligation to watch over the rights and to render the condition of future generations secure before the law; to guarantee the safety and tranquillity of the family and, by so doing, the most vital interests of society; to strengthen and safeguard public morals endangered by this custom of a marriage ceremony exclusively religious. The State must guard against a custom that offers opportunities and incentives for dishonorable conduct and under the guise of good morals destroys public understanding of the legal nature of matrimony and its essentially moral nature. Many are thus turned away from the only true and honorable state of marriage, which is that sanctioned alike by moral considerations and the general law, by conscience and by statute. In the second place, the nature of the State, and therefore its duties, gives it the right to regulate, without interference or opposition, the form, conditions, and effects of so important an ethico-juridical institution as marriage, and consequently to command respect for the principles upon which that institution is founded and to punish their violation as embracing all the elements of a crime. Even if there were no other hurt or peril, the moral sense would be deeply offended by the contradiction between the presumed and the real state of affairs, when marriage appears valid and the children legitimate to the consciences of believers in the Church, but void and the children bastards according to secular law. The mere existence of so lamentable an anomaly shocks our intelligence and our conscience.

¹ Cf. *Padelletti*, "Lo Stato e il matrimonio ecclesiastico", "Nuova Antologia" (May, 1877); *Filomusi-Guelfi*, "Il matrimonio religioso e il diritto" (Rome, 1874); and *Gabba*, "I due matrimoni civile e religioso nell'odierno diritto italiano" (Pisa, 1876).

² "Opusculi", "Le tre concubine", and "Il delitto e il matrimonio ecclesiastico", Vols. IV, pp. 471-518 and V, pp. 107-144.

These reasons necessitate putting an end once for all to such a state of affairs. Italy must follow the example of France, Belgium, Germany, and Switzerland. The proposed law must be voted without adding to a delay which I believe, with Padelletti, to be attributable to the narrow jealousies of politics, the obstinacy of conscienceless theorists, and the intrigues of the clergy.¹

Less urgent and less ready for adoption by the nation is the reform of the indissolubility of marriage as established by the Code. Legal science called for this reform, not indeed as an ideal but as a sad necessity, the lesser of two evils. Yet even here it met with opposition. The Code has justly been accused of inconsistency, because after having prepared the ground and the occasion for divorce, by secularizing marriage and recognizing its contractual character, it then rejected it. The influence of the doctrines of the Church has thus far been strong enough to exclude absolute divorce; but now that its influence has decreased, we may hope, wrote Gabba,² that absolute divorce will soon be the law common to civilized Europe. And this, he declared, would be one of the most brilliant victories of scientific over theocratic law. This hope has its serious legal, moral, and political reasons as well. Though marriage is a contract "*sui generis*" and possessing a peculiar form, scope, and character, yet it remains a contract. Absolute indissolubility of the "*vinculum juris*", can never, therefore, properly be predicated of the state of facts resulting from a contractual expression of will; to declare marriage indissoluble is an obvious legal inconsistency. To perpetuate in a purely abstract, formal, and external manner a bond that has been dissolved in substance, even after it has been possible to ascertain legally the causes of the disunion, is a restraint upon the liberty of the individual; it is a tyranny that robs the married parties of the right to be the masters of their own persons and that exposes them (and, after all, law is made for the benefit of man) to the disorder that comes of unlawful union. Surely this is not conducive to good morals, while to deny divorce to the members of a religious faith that accepts it is to offend involuntarily those consciences that have declared themselves free.

It seems to me (I was going to say that it has always seemed to me, and that is proof certain that I am not a convert to the cause of divorce) that beneath the theory of the indissolubility of mar-

¹ This address was delivered when Italian law had not yet to lament the premature loss of one of its most able scholars, Guido Padelletti.

² "*Studi di legislazione comparata*" (Milan, 1861), p. 238.

riage lies concealed the old notion of the omnipotence of law,—that old idea that the law is what gives existence to this juridical relation. The truth is that it comes into existence through the act of the parties, by the very nature of the act and through the intent of the parties who create the relation in fact. Law merely defines, recognizes, and regulates it. When for some serious cause the bond creating the sanctuary of the family is loosed apart, the legal relation or, if you will, its substratum ceases to exist. No doubt divorce is repugnant to the nature and the ethical idea of marriage; but the very fact that marriage is a moral bond is why its dissolution must be left free, a matter for the *personal conscience*. Indissolubility of marriage cannot be imposed by law as a principle, for law does not govern marriage within a fixed and external world, but amid the changing and contingent facts that constitute its sphere of action.

Though many believe the contrary, there is no provision for the interests of the children of such a union. Besides the fact that the motives for denying divorce grow less where there are no children, and conversely that like considerations should debar widowers from remarrying, the want of interest which the law demonstrates for the offspring stands out clearly enough upon our stopping to consider how much more pitiable their condition is under the hybrid state of legal separation than under absolute divorce. For, whereas after an absolute divorce the children could live in a regularly constituted family, after separation, in the majority of cases, they witness the elevating drama of an irregular relationship.¹

If we of the Latin race who have rejected divorce consider its effects in the other countries of Europe and in North America, we shall have further reason to confess that it is an institution belonging to races where there is a higher standard of marital fidelity, where the family tie is stronger and where morals are higher. And this is easily explained. Divorce is a guaranty of fidelity because in practice at least it constitutes the real and effective penalty of adultery. Such considerations should have great weight in the minds of those who in a practical manner would raise, however little, the low state of our public morals.²

¹ This reason has been well set forth by Legouvé and by Pelletan and is decisive for me.

² *J. Tissot*, "Le mariage, la séparation et le divorce" (Paris, 1868); also the article published in the "Monitore dei Tribunali" (Milan, 1868), nos. 43, 44, by the eminent *Emilio Brusa*, now professor at the University of Amsterdam. Within the ten years following this book the literature of divorce was enriched by many important publications. However, the

A consequence of the adoption of civil marriage was to remove the impediments belonging exclusively to any one religion. Whatever contrary opinion may have been pronounced by the Courts (which have fallen into the serious error of believing that the law must enforce the observance of the Church prescriptions), the letter and the spirit of the Code restored to those who had previously been fettered by the clergy their legal capacity with respect to marriage, guardianship, adoption, and legitimation. As in marriage, so in respect to births and deaths the Church has lost its right to intervene. One of the main benefits of the Civil Code (as Vigliani said on presenting the draft of the Code) has been without a doubt to place the register of civil status under the charge of the government.

§ 4. **Law of Persons as regulated in the Code.** — When speaking of private international law and marriage I alluded to some of the reforms in the law of *persons*. Taking up this subject now directly, let me first call attention to the high respect that has been paid to the liberty of the individual by allowing full liberty of speech, limiting it only in special cases or by reason of a higher right or for serious considerations of public policy.

The law of persons was built upon the principle of equality, and of exclusion of privilege. Adopting a lofty conception of man's destiny, the inviolability of his rights was established and the last vestige of civil death obliterated. In many instances those moral ideals were illumined by a real splendor, too often conspicuously absent from the French Code, — ideals which (in the fine words of Sclopis) are like an aroma that keeps sweet our civil institutions. Yet in this very regard I am sorry to have to state that, while curtailed and altered so as almost to be abolished in civil matters, personal arrest was retained in the new Italian Code.

Citizenship and domicile were made determinable by the free will of the party, and the citizen was allowed to renounce his nationality. A free nation, it was said, has need of free men, not serfs.

The home was placed under the authority of the husband and

problem has yet to be given a practical trend in the light of actual law, or to be taken out of the realm of pure discussion into that of life. An exhaustive statistical investigation must first be made in Italy to determine whether the system of divorce "*a mensa et thoro*" accomplishes its end and meets the needs of the population; or whether the public does not voice a demand for divorce "*a vinculis matrimonii*." The criminal statistics of cases of adultery could show by their number and results to what extent a provision of the Criminal Code protects the inviolability of marriage.

father, without, however, submerging individual personality in the unity of the head of the family group. In this way paternal authority was made what nature designed it and modern civilization demands that it be, — not a right created for the benefit of the father, nor an authority over the persons of his children, but a moral principle exercised for the welfare of the offspring and of the entire family. The law of guardianship was ameliorated by enlarging the Court's power to intervene, by providing for greater publicity, by giving the family council a continuous existence, and by rendering the guardian's administration simpler, speedier, and more economical.

From these general observations it seems opportune to turn to the consideration of two special and highly important problems: the legal status of women and of illegitimate children. These are inquiries of great moment, particularly the first; for to form a correct estimate of the moral standard of a nation, it is enough to determine its conception of woman and the position assigned to her by law.

The problem of woman's position is a favorite theme for the critical and liberal spirit of our century. It has been studied from every point of view, beginning with the physiological; the various branches of intellectual activity have all contributed their share, from the drama of Alexandre Dumas to the philosophical works of John Stuart Mill; the history, customs, and laws of the various nations have been scrutinized with patience and erudition. All this labor has created an opinion favoring a veritable social revolution, a complete reform of the moral, legal, and political status of woman. Nevertheless, Gabba, considered a keen observer, recently said that the unfounded opinions and exaggerated hopes that had been raised upon the reform of the law of woman's rights were among the most fallacious and dangerous social doctrines of the age.¹

I feel that the vital element of the whole problem has been overlooked, — that of the natural mission of woman. Ethics and law have often been shockingly confused; State and Legislature have been called upon to accomplish what only education, custom, and public opinion can bring about. For myself I reject emancipation. As Ferrari says, it would mean the emancipation of woman from her nature, her mission, her modesty, and her dignity. To the historical (indeed the prehistorical) dust-heap, I would relegate that so-called system of gynecocracy by which, during the

¹ "Intorno ad alcuni più generali problemi della Scienza sociale" (Turin, 1876), p. 158.

primitive communism of human society (according to the recent researches of Bachofen, Lubbock, McLennan, Giraud Teulon, and others), the woman and mother appear to have regulated family rights with sovereign power. I reject, too, those more or less socialistic theories of the absolute independence of woman. These theories, which aim to re-establish the domestic partnership upon the basis of maternity (because always ascertainable) have been sympathetically and eloquently summarized by that apostle of woman's rights, E. de Girardin, in his two famous aphorisms: "*La femme libre*" and "*La liberté légale dans le mariage.*" Putting aside, then, all doctrinal prejudices, we can examine this branch of Italian law with a more independent mind.

In general, it may be said that the position of woman has been greatly improved. The traditional idea of guardianship of the sex has been abandoned; equality in the rights of succession has been established; the last traces of those unjust preferences given to agnate relatives have disappeared; the mother and father enjoy "paternal authority" together, although during marriage its exercise has been reserved to the father. The dignity of the wife's position has been raised; the high moral conception that she should be man's companion rather than his chattel is evident in many provisions, especially in the establishment of the rights and obligations between husband and wife upon a standard of reciprocity. Ascendants in the female line and sisters of the whole blood have been admitted to guardianship; the woman may act as surety and the law recognizes her act as valid; if unmarried or a widow, her civil capacity over property has been made in all respects equal to that of man.

But what of the married woman? This branch of the law is a subject of severe criticism. The legislator has been accused of lacking the courage to put both sexes on a complete equality as logic requires. If we admit that woman has within herself the capacity to administer and dispose of her separate estate, and if the notion of pagan antiquity regarding the inexperience and frailty of the sex is discarded, it follows that marriage of itself cannot deprive the married parties of the right of disposing of their property. It does not in fact deprive the husband of his rights, and therefore there is no reason in law why the wife should be divested of hers. These were the arguments put forward by Pisanelli when supporting his draft of the Code (as also by Miglietti when supporting his), to do away with the necessity of authorization of the wife's acts by the husband. And Pisanelli added the

significant fact that in Italy, the direct heir to the Justinian reforms, authorization was not deemed necessary until introduced through French law. I am opposed on principle to this "capitis diminutio" of woman, and would have the law reach a full recognition of her individuality. Still, in view of special and transitory conditions in Italy, it does not seem to me a great mistake to have maintained it, nor can I make up my mind to swell the number of those jurists who would abolish it at once.

But even in this matter the Italian Code undoubtedly marks a notable progress. The number of the wife's acts requiring the husband's authorization has been so limited that they may be considered the exception rather than the rule. She may receive a general authorization; she may act alone without her husband's joinder when he lacks capacity to act himself or is disqualified from authorizing her. So the very spirit of the rule requiring marital authorization has been transformed, for, as Gide observes,¹ while a certain eclecticism is apparent (as a result of the necessity of reconciling the two systems), and while prejudices favoring the husband's sex and control are still just discernible, nevertheless, the chief aim of the legislator — indeed the only rational one — was to conserve the family estate. But there still remain so many contradictions, inconsistencies, doubts, and omissions in regard to the rule that I do not hesitate to describe the regulation of marital control by the Italian Code as both confused and inadequate. Either the necessity for marital authorization should have been extended to all acts beyond those of simple business management, or at least the acts requiring authorization should have been enumerated with greater care. In that way certain acts, far more dangerous than those enumerated, would not have been omitted.

It is certainly not to be commended that women as a general rule were excluded from acting as witnesses to documents of a public and formal nature. But logic, I am glad to say, has recently led to the abolition of the rule.

The saying of Papinian regarding the Roman woman, "in multis juris nostri articulis deterior est conditio foeminarum quam masculorum", has been declared to sum up with equal truth the position of women under the Italian Code. Were the words true, still it must not be forgotten that giant strides have been made. But for further progress it is not enough to reform the letter of the

¹ *Gide* was well qualified to speak on the subject. Cf. "De la législation civile dans le nouveau royaume d'Italie" (Paris, 1866), p. 16.

law. The ground must be prepared by altering customs and public opinion which is always shackled by tradition and prejudice, and by more seriously undertaking the practical education of woman. The task is a great one; it will not do to patch the matter; it must be entirely re-made, and promptly.¹

If the legal position of woman is a problem, that of the illegitimate child is something more: there is something of the enigma in it because science and law here come face to face with nature. Jurisprudence has her mysteries like physiology. The latter may lament her mysteries as imperfections, but the former runs the risk of being unjust. Justice demands that the natural child be recognized as the subject of a legal relation binding him to another person by the fact of birth. Law does not consequently, in the *abstract*, contest his right to establish his paternity by legal inquiry. When, however, it comes to giving a *concrete* expression to this right, to protecting and supporting it, justice admits its inability to act in the face of the impossibility of proof, or unless proof is furnished through recognition by the father or through a presumption arising from special circumstances. That this should be the case seems clear and just to some people; I shall not discuss it. But it is certain that logic ends and injustice begins when circumstantial evidence or recognition by the father are not given their proper value, and when the law (which of itself can know nothing), assuming to be better informed than the father who has furnished proof, has the hardihood to say to him: "You are mistaken."

This is what the Italian Code has done. It prohibited all inquiry into paternity. More than this, it took an obvious step backwards when it refused to follow the liberal example of King Albert's Law and denied the paternal relation even where the father presented a written acknowledgment or where the relationship was shown by the care which, as father, he bestowed over a period of time upon the child. On the other hand, an action for support was granted to children whose paternity the law would not recognize in the former instance (*i.e.* where recognized in writing). Here was an inconsistency which the fallacious arguments growing out of the distinction between the two cases certainly have not helped to clear up. Instead of the wisdom of the Roman law and the equity of the Canon law, which governed with beneficial results in some parts of Italy, and in place of the potent example of the law of many other nations, the influence of the French Code and its commentators has prevailed, though their arguments have

¹ In this I agree with *Pertusati*, "Morale sociale."

been successfully rebutted by the majority of writers on legal and political philosophy.¹

But the justice of the reasons put forth by these authors and the force of public opinion make it likely that the time to abolish an *unjust, immoral, and unwise* prohibition is at hand. The law is unjust, because the exercise of a right (and pray what right is more fundamental?) cannot be denied or limited by reason of the difficulty of its proof, and because the mother and child are wronged so long as the law frees the father from the natural obligation of providing for them and leaves this burden to weigh inequitably upon the mother alone. It is immoral and unwise because it countenances irresponsibility regarding so serious an act as that of giving existence to a human being, and so facilitates cowardly desertions and sets a premium upon dishonesty. Perils, scandals, and causes of all sorts are feared. But may they not arise now? May they not weigh even more heavily upon woman under the present system? And, furthermore, can it be that the experience of the old law and of so many civilized nations justifies those fears? Certainly not. The policy of the Italian law is not a sound one. Public morals, the tranquillity of the family, the good repute of citizens — these are not guarded by casting a cloak of silence over a shamefully inhuman act, or by sacrificing the sacred rights of human individuality to the phantom of so-called social considerations. Rather are they fortified and supported by being given into the protection of the law, and by maintaining in every case and to the very limit the principle of personal responsibility.

In spite of these severe criticisms I am glad to acknowledge and approve the numerous and important reforms that a spirit of liberalism introduced to ameliorate the position of the illegitimate child, especially the changes in the law of inheritance. But even in this regard greater and better reforms can and should be accomplished.²

¹ Investigations as to paternity are permitted in England, Austria, Baden, Bavaria, Prussia, Denmark, Russia, Roumania, Spain, Portugal, Greece, the Ionian Islands, many of the Swiss Cantons, and the United States including Louisiana. How can it be said then (*cf. Vigliani's* "Report" upon the draft of the Code) that the denial of the right was a principle of common law to civilized nations? For the opinion of jurists, *cf. Röder*, "Kritische Beiträge zur Vergleichung der deutschen und ausländischen Gesetzgebung über die außereheliche Geschlechtsgemeinschaft"; *E. Acollas*, "Le droit de l'enfant né hors mariage" (Paris, 1872). Among Italian authors may be mentioned *Rosmini, Carrara, Gabba, Albini, Mattiolo, Filomusi-Guelfi, Ronga, Saredo, Precerutti*, the last of whom with pitiless logic has presented a powerful summary of the question in the "Legge", 5th year, no. 68.

² *Cf. Scandiani*, "Delle successioni legittime", found in "Archivio Giuridico", Vol. V., pp. 427 *et seq.*

§ 5. **Property under the Code.** — Referring now to that branch of the law relating to property or *economic* law, I realize more than ever the limitations forced upon me by the bounds of a mere address, and I fear lest my observations, confined as they must be to a few very fundamental points, will be still more imperfect and incomplete than the discussion so far.

The French Code has been a target for the fierce assaults of economists. Among these Rossi¹ inquired whether it was still in harmony with the altered economic conditions of modern society. Only too accurate was his summary of the discouraging conclusions drawn from economic considerations, when he declared that society and civil law did not seem to be made for one another.² Were the great jurist alive to-day, he would observe with pride that the legislation of his country had (if not wholly, at least to a degree) realized his hopes, and that even in foreign opinion the Italian Code had attained in this respect an undeniable superiority not only over the French but over all other European codes. Wherein lies this superiority?

With few exceptions, the right of property and its different sorts have been regulated in a reasonable spirit of conciliation between the right of the individual and the justifiable interests of the public. The rights of the inventor and author have been regulated in substantial accord with the true principles of legal and economic philosophy. The general principles of ownership in common and of possession have been logically formulated; the difficult subject of possessory actions has been excellently systematized. Regarding easements and water rights, the reforms of the Code of King Albert have been retained and even brought into line with the most recent progress in agriculture and the physical and mathematical sciences. The Italian legislator deserves the gratitude of the agricultural industries. The provisions which he has drafted are a worthy monument to the memory of that great author of "Prin-

¹ Cf. "Observations sur le droit civil français considéré dans ses rapports avec l'état économique de la société", in his "Mélanges", Vol. II.

² Even more radical than Rossi is the criticism of *Bathie* in his "Revision du Code Napoléon" (Paris, 1866). Examining French law solely from an economic point of view and aside from any ethical or legal principles, he appealed for a reform, which certainly from these last two points of view could not be too strongly recommended. It is impossible to criticize civil legislation by applying the measure of economic principles to it unless the essential relations between economics and law are first determined. If conversely we consider a legal problem according to the canons of pure science as determined by rigid economic laws, we run the risk of sacrificing a principle of justice to a utilitarian end. With this criterion in mind I am undertaking a special examination of the Italian Civil Code from the economic point of view.

ciples of Justice Applied to Water Rights", Gian Domenico Romagnosi.¹

Testacy and intestacy are undoubtedly one of the most remarkable parts of the Code. The latest conclusions of the philosophy of civil law have found adoption and the requirements of modern civilization have been met. Surely Italians are justified in their pride when one of the greatest French jurists, Théophile Huc,² confesses that some day his country need but incorporate the rules of Italian law in many matters to effect a needed reform.

Testate and intestate succession have been placed upon the same level before the law, without any suggestion of preference being accorded to either. The holographic will has been sanctioned in all its simplicity. The right to disinherit has been denied. The right to leave by will has been reconciled with the claims of the family, by reducing the prescribed portions claimable by the descendants to a *fixed* one-half of the possessions of the testator. In this way the equally dangerous shoals of too small or too large an inalienable portion have been avoided. Upon the former of these the Franco-Roman system struck when it adopted the rule that the disposable portion should be determined by the number of heirs. The right to inherit, or the right over the indisposable portion, has been extended to such persons as the deceased may be presumed to have intended to help, or towards whom he owed binding moral and legal duties. In this way the interests of the natural child have been protected.

By a courageous reform of a long-standing injustice, the married couple have been given that guaranty of mutual assistance which, at the time of their marriage, they certainly intended should continue after the death of either one of them. The principle of representation has been introduced into testamentary succession (an anomalous case), upon the grounds of the presumed intent of the testator and to establish equality amongst the heirs. Where ascendants are called to inherit, the nearest is preferred, because of the presumption of affection, which, according to the old Aristotelian conception, decreases in ascending. All distinction has been abolished between normal and privileged inheritance (as where an ascendant is called ahead of the next of kin to inherit the gift which he made to the deceased), as also all differences of succession according to the source of the property (purchased or inherited, maternal or paternal line). Every preference favoring

¹ "Ragione civile delle acque."

² "Le code civil italien et le Code Napoléon" (Paris, 1868).

the first-born or the male sex has been abandoned. The trust-entail has been abolished, such as a special entail male for the benefit of the eldest son or any other trust-entail for remainders, even where a father names a beneficiary who is to take if his heir dies a minor and incapable of naming his own heir. By these provisions all obstacles to the free circulation of property have been removed; the way has been opened to a distribution of ownership, which is not only of great economic but also of great moral and political value, as it tends to increase the number of property holders and thereby to weaken the ranks of the enemies of property and strengthen the foundations of our threatened social edifice.

One other reform remains desirable, that of substituting for escheat to the State escheat to the municipality or some charitable work. The presumed intent of the deceased has been made the governing principle of intestate law. It would have been more logical and equitable, therefore, to call those institutions to take which the deceased may have been presumed to have desired to benefit, and which may have been presumed to have entertained some hope with respect to his fortune. In this I agree with Buniva,¹ Curcio,² Scandiani,³ and also Rodière, who has pointed out the grave objection that escheat to the State aids the socialist's utopia, because it presupposes a sort of primitive title in the State from which ownership is derived and to which it reverts.⁴

§ 6. **Contract under the Code.** — Passing now to *contract* law, it may be said without reservation that the broadest possible individual liberty has been made the general rule. It is indeed encouraging to hear the legislator repeatedly insist upon the ideal of maintaining inviolate the right of the individual.

Whoever has the capacity to dispose freely of his property (says the "Report" on the draft of the Code by the Government and the Senate) must be permitted to alienate it as he desires: a guardianship imposed by law on those who have reached majority is not a principle that entered into the making of the new Code. Out of respect for the liberty of contract, the intent of the parties was made the law governing their agreement. The heirs of a deceased person may no longer insist upon the resale to them of the share in the estate which a third party has had assigned to him from an heir

¹ "Successioni legittime e testamentarie", p. 95.

² "Lettere sul Codice civile" (1866), p. 20.

³ "Successioni legittime", in "Archivio Giuridico", Vol. VI, p. 431.

⁴ "Changements à introduire dans l'ordre des successions", in "Recueil de l'Académie de législation" (1856), Vol. V, pp. 143 *et seq.*

of the deceased.¹ Gifts have been freed from useless solemnities of form and from the intervention and approval of the court. The right to fix the rate of interest by agreement, even of providing for compound interest on loans, was established: this resulted in the disappearance of the old Church prejudice which held money to be unproductive; and the Code is thus brought into line with the Sardinian law of 1857, which made Italy, through the great mind of Camillo Cavour, the standard-bearer of European progress. The irrevocable promise, made on the occasion of a marriage, to bequeath property to a specific person, was excluded, as contrary to the integrity of legal principles no less than to economic requirements; since it rendered titles uncertain and precarious, struck at the heart of land credit, and upset the entire mortgage system.

To remove uncertainty in rights in general and to facilitate their transmission, as well as to keep abreast in the mad race of modern economic life, the period of limitation of actions to rescind and annul contracts was reduced. The old assignment for the benefit of creditors, which could be imposed upon them, was eliminated; indeed it had no application after personal arrest in civil matters had been restricted. Reforms highly favorable to credit, which increases in proportion to the facility and promptness in giving satisfaction to creditors, were those re-establishing the Roman maxim that the debtor is put in default by the mere expiration of the time allowed for performance, and those taking from the court the right to extend the period of execution of a contract or to reduce liquidated damages.

In the contract of marriage, the law adopted a neutral position, granting the parties liberty to determine for themselves the form of "charter" they would adopt for their home, by choosing between the dotal system (that is, the separation of the estates) and the system of co-ownership. If so provided in the marriage settlement, the husband may alienate or mortgage the property constituting his wife's dowry. The necessities of credit demanded this provision; it was also advisable in order to facilitate the circulation of property, and further for the legal reason that a prohibition against it would be illogical and useless so long as the dotal system were not made obligatory. And indeed to do so would be absurd.

Out of respect for the opinion of economists *emphyteusis*² was retained. But all the old feudal elements were eliminated by

¹ "Il riscatto o retratto."

² [A lease for indefinite period or in perpetuity, corresponding to the customary copyhold tenures of English common law. — ED.]

giving the tenant power to redeem the rent at will. In this form the institution will render important service to uncultivated lands and lands held by municipalities and other corporate bodies. A wise regulation of the metayer system of working the land (produce-sharing as rent) was provided, which should benefit a country above all agricultural. Many economists and agriculturists were of the opinion of Adam Smith and Young, who ignored the great moral and political advantages of this institution and emphasized the reduced productivity which went along with it. Their disapproval was too sweeping and absolute. I believe that in Italy this institution may protect us from the storm that is threatening too abrupt a solution of the so-called agrarian question.¹

To strengthen credit, to give safety to property dealings, and to develop land credit, which is so important in agriculture, a system of broad and complete publicity was introduced in the transfer of property rights by a recording system, and by an excellent mortgage law based upon publicity of transfer and specification of the property (*i.e.* in contrast to a general hypothec of all property).

I have indicated the points that are deserving of praise; I cannot now pass in silence over the defects and omissions to be found in this branch of the law. Liberty of contract was not always respected. Sometimes recourse was had to that legal protectionism for which we aimed to substitute self-reliance.

By maintaining the right of redemption of a chose in action by the debtor's paying merely the consideration of the assignment, an obstacle, both unjust and productive of moral and economic injury, was perpetuated in transfers of such rights. Not the greatest injury done is that which the assignor eventually suffers when by reason of the danger of the redemption of the debt he finds his market greatly restricted. The rate of interest was allowed to be fixed freely by agreement; but by a flagrant inconsistency the debtor was permitted to nullify a contract which he had deliberately entered into by reimbursing at the end of five years, contrary to the terms of the loan, the capital of a debt bearing interest in excess of the legal rate. Another contradiction of the principle

¹ I am glad to be able to cite as favoring the metayer system: *John Stuart Mill*, "Principles of Political Economy", II, 8, and *Roscher*, "Economia dell'agricoltura e delle materie prime", §§ 59, 60. The system has received distinguished support in Italy: *Rabbino*: "Il contratto di mezzadria nei suoi rapporti colle odierne questioni economico-sociali" (Reggio, 1874), and the practical criticism of *R. Lambruschini*, "Intorno al valore tecnico e morale della mezzadria."

of liberty was the retention of the rule that a sale of real property might be rescinded on the grounds of the inequity of the price (the inequity being fixed by law). Precerutti rightly condemned such a rule as autocratic and arbitrary, a result of false paternalism savoring of socialism, and productive of the same result as a forced loan between the parties.¹ There is certainly no legal reason for a rule which permits *one* class of contracts over *one* kind of property freely entered into without fraud, to be rescinded by *one* only of the contracting parties. From the economic point of view, what does the law of demand and supply consider an inequitable, what a fair price? The nature and weight of the necessity which is held to burden the vendor increases the intensity of his need of money. This is an element which naturally decreases the price of the land; but it has not been considered by the law. The same criticism may be made of the prohibition of the clause of forfeiture on default² in a pledge, a clause which in effect turns the pledge into a conditional sale.

All these encroachments of the law upon the liberty of contract are ascribable to the influence of Roman Law, misunderstood in its historical origin and consequently misapplied; for we now know that similar Constitutions of the Emperors were not justified on judicial grounds but by the great economic and social unrest of that time.³

Yet more grave are the law's omissions. We have been and still are witnesses of an economic revolution, and this has brought with it a profound social revolution. I refer to the ever-increasing importance of personal property as wealth. Capital and labor are gradually acquiring a larger productive value in comparison with the other coefficient of production, nature. The changes that have taken place in the industrial world by perfecting the instruments of intercourse in their double aspect of transportation and exchange, through railroads and all kind of negotiable instruments, and by the introduction of stock companies that have become a field of investment by the private capitalist and the bank, have wrought a marvellous transformation in the manufacturing and commercial industries, raising them slowly from their low estate to an economic and social equality with landed wealth. The aristocratic supremacy of the landowner has, so to speak, been levelled by the ever-rising importance of movable wealth. That fantas-

¹ In the "Archivio Giuridico", Vol. IV, pp. 227 *et seq.*

² [*Pactum commissorium*.]

³ See Padelletti, "Storia del diritto Romano", chapter LX.

tic genius Heine was able with truth to say in his "Louis Boerne" that Rothschild was one of the greatest revolutionists who have created modern democracy.

But this rapid and important development of movable wealth was entirely neglected in the Italian Code, as in the French, in spite of the fact that the Senatorial Commission pointed out that it was inevitable. In vain one looks for provisions defining the legal character of railroads, regulating the management of manufacturing establishments, or fixing the principles that should guide that most powerful factor in economic progress, the industrial company, "which must be given an effective form and legal protection."¹ In aleatory contracts an unwillingness was manifest to define and regulate (so far as they fell within the civil law) contracts of future performance, especially those constituting industrial shares and securities. Such provisions would have prevented the deplorable confusion and errors of the Courts' decisions. The legal form of the contract of insurance was not settled, and this has worked great harm; for, as Rossi himself said, the silence of the law must also be held responsible for the fact that insurance is still beset with serious obstacles, and that the public remains indifferent to an institution capable of procuring it very great advantages both material and moral, especially in the field of life insurance.

§ 7. **The Code as a National Achievement.** — In spite of the defects and omissions that have been pointed out, and of numerous others that might be discovered upon closer examination, the Italian Code remains to-day a serious and admirable monument to the legal learning and vitality, never indeed denied, of the descendants of Rome. Wolgraff, who was a sworn opponent of codification, has said that nations adopt codes only when decadent and corrupt. Some examples in history may justify so daring a statement; but its sweeping generality can be answered by brilliant instances to the contrary. Suffice, indeed, to cite the example of that people who wrought the unity of their law when they had discovered within themselves those forces needed to win their independence and to recommence their history; here surely is proof that the corrupting influence of ages of despotism was powerless to smother the sacred genius of Italy.

Whether for its liberal spirit or for a merit which we might call doctrinal or scientific, the Italian Civil Code may be considered to-day as the best legislation upon private law in Europe. Such an

¹ Senatorial Report.

estimate is neither exaggerated nor inspired by national pride ; for it is that held even by foreigners. Among these is Huc, who, after examining the Italian Code with sympathetic learning in his excellent work on comparative law and after having remarked upon its points of superiority over the French Code, concluded by declaring it a labor full worthy of an independent nation. What praise could be greater?

I am eager to mention another merit also which I esteem indeed the greatest of all and which is a definite reply to that question which I put in the early part of this address: Is the Civil Code a true contemporaneous history of our law? Is it a truly original and national achievement? I do not hesitate to declare it to be such.

I cannot indeed say so much for the other codified parts of Italian Law. In those branches of the law, native traditions have been disregarded or neglected and servile copies of foreign institutions have been adopted which are not and cannot become Italian. But the civil law was born under more favorable auspices. Reforms and new departures were introduced, but they had been matured by time and slowly elaborated in the legal conscience of the nation and in the opinions of writers and the Courts. The Code marked no violent shock or superimposed no artificial machinery. The advance was along the road of progress ; but it was marked by a wise caution and moderation, so difficult yet so indicative of strength. Excellence in the science of law-making certainly is not gained by drafting the law of a nation upon fixed and universal archetypes, much less by rigidly crystallizing it as it is found. Reason must not be allowed to divorce history ; there must be no antagonism between ideal and reality, no discord between law and custom. Rather should history be led towards perfection : law should interpret and voice the popular conscience, guiding it yet reflecting the true form, trend, and needs, the intellectual, moral, and economic conditions of national life. The future must be provided for, and, at the same time, all that is live and substantial in the inheritance of the past must be preserved, formed to present requirements and prepared for the progress of the future. A code must be both a history and a system ; it must promote those two great forces, conservation and progress, upon whose parallel development hangs the welfare of organized society as well as the harmony of the entire world. These principles our law-makers received in the unbroken tradition of the Italian school from Pythagoras to Vico, and in the conspicuously philosophical tend-

ency so characteristic of our genius.¹ They were not unmindful of them.

Thus were avoided the dangers and disadvantages of codification. Perhaps Savigny was right when he said that a nation abides by the judgment of the dead when it adopts a code which is insensible to the changes that are taking place in the manner of life, and which claims to be the last pronouncement of the law, concentrating the whole legal organism of national life into a few phrases. Let me repeat that we must keep in mind the future and the progressive life of the law. "Time builds the codes, not man."² True; and codification has not choked the life of Italian law nor circumscribed the continuous activity of the national spirit. It has indeed rather opened the doors to all the lanes of progress which the demands of science, the leadership of jurisprudence, and the needs of society keep creating. The Italian Code, instead of being, as some legislators have protested, an unalterable and closed body of doctrine, will prove the starting point and the inspiration of future progress.

¹ I am here merely summarizing and applying the ideas in my work already cited, "*Della consuetudine nei suoi rapporti col diritto e colla legislazione*", pp. 69 *et seq.* [appearing in the same volume as the present discourse, pp. 1-127.]

² *Portalis*.

CHAPTER IX

THE COMMERCIAL CODES

BY ALFREDO ROCCO¹

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| § 1. By the 1850s French Influence Dominant.
§ 2. Backwardness of Germany and Italy.
§ 3. Renaissance in Germany; Work of Thöl and Goldschmidt. | § 4. The German Commercial Code of 1861 and its Influence.
§ 5. France since 1850.
§ 6. Italy since 1850. |
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§ 1. **By the 1850s French Influence Dominant through the Commercial Code and Judicial Practice.** — Towards the middle of the 1800s, scientific leadership, both in legislation and judicial practice, in the mercantile field undoubtedly belonged to France. Here, too, her notable work of codification had assured a supremacy of which not a few traces remain still visible. It was certainly not because the French Commercial Code of 1807 was an expression of original juridical thought. On the contrary, the law which it established was in its origin largely foreign to France; candor requires us to note that Italy had furnished these origins. As Frémery, one of the most talented of the French commercial jurists, well said in his history of commercial law: whatever the point of departure, one always comes to Italy. The institutions and rules which were worked out by the Italian commercial cities of the Middle Ages, and passed into France during the 1400s and 1500s, found in the Commercial Code of Napoleon a complete, simple, and systematic expression; and in the success of the French armies and ideals this Code was given the means to conquer the world. Thus, in the first half of the 1800s, the French Commercial Code penetrated (in its original form or in reproductions scarcely distinguishable from it) throughout almost the whole of Europe and the States of South America, while the supremacy of French

¹ [This Essay appeared in the Transactions of the Fifth Annual Meeting of the Italian Society for the Progress of the Sciences, held at Rome in 1911 (pp. 645-655), under the title "Lo sviluppo del diritto commerciale nell'ultimo cinquantennio."]

The author is professor of Commercial Law in the University of Macerata and the Bocconi Commercial University at Milan, and also lecturer at the University of Parma. — Ed.]

commercial text-writers and judicial practice everywhere asserted itself.

The success was well deserved; for the scientific and practical cultivation of commercial law had been during the first fifty years of the century intense and rich in France. The ground had been prepared by judicial practice, not only in the commercial courts, where beside magistrates sat men of affairs and merchants, but also in the courts of appeal and the Supreme Court, where justice was administered by eminent men, at once learned judges and famous scholars. Thus had been built up an imposing body of judicial practice, admirable for its sagacity and common sense and for its precise, simple, and clear solutions, which had in a remarkable degree adjusted the written rules to the ever-increasing and multiplying requirements of business. These decisions contained a valuable store of material; they were in part the basis of a truly brilliant literary activity, in which all the elements of juridical investigation were utilized with a wisdom and nicety which we can but admire even to-day. While in Germany the dispute raged between the followers of the historical school and the philosophical school, and while, as a result, commercial law there still awaited the impulse for a fruitful revival; in France a wise combination of the historical, exegetical, and dogmatical methods had constructed the science of French commercial law upon solid foundations.

The historical sources of commercial law had been explored with great discernment and diligence by Pardessus and by Frémery; Vincens had explored juridical principles in the light of business experience; Massé had produced a vigorous and profound treatise upon modern commercial law from the dogmatic and systematic point of view; Pardessus had summarized with sculptured brevity the doctrines of contemporary commercial writers; Bravard-Veyrières had with subtle and penetrating criticism reviewed and revised all the reigning doctrines of business law. Monographs, commentaries, dictionaries, and reviews containing the judicial decisions had accumulated into a vast material for study and research. The science of commercial law in France, had, in short, during the first fifty years of the century, been signally active in all fields, leaving indelible traces everywhere. In maritime law and bankruptcy, for example, it has not become obsolete even to-day.

§ 2. **Backwardness of Germany and Italy.** — The conditions for the study of commercial law in Germany, on the other hand, were not very favorable, during almost the whole of the first half of the 1800s. Until the adoption of the law of Bills of Exchange of 1847,

there was no effort at codification of the civil or common law. Amidst the confusion of study and research which the historical school had stimulated in almost all the fields of law, commercial law alone remained neglected. As to scientific literature, commercial law possessed no independent treatise, but was treated briefly in the manuals of civil law. In the universities it was studied as part of German private law, in a course covering a few weeks.

But while the decadent situation of commercial study in Germany constituted a deplorable exception amid the reawakening of legal science in all other fields, and while everything was still preparing for the coming revival in the field of commercial law also, in Italy, on the other hand, the condition of things was even more serious, and one may say desperate. Here, in fact, not alone commercial law, but also law in general had almost universally reached a critical stage. It is not surprising, therefore, that the study of commercial law, which had had its periods of true florescence in Italy, fell to servile reproductions, not infrequently compiled from ill-digested French doctrines. While codes which were only translations or imitations of the French Commercial Code were in force in various parts of Italy, it was quite natural that the very rich and splendid body of French judicial practice should be accepted as authority and render impossible the rise of a national school of mercantile law. Though the 1700s had come to a close with names that are still remembered with honor, such as Azuni, De Jorio, Baldasseroni, yet from the first years of the 1800s until 1850 we do not find (with the exception perhaps of Casarini's treatise) a single work on commercial law worthy of mention to-day. Few now, in fact, even among the initiated, know the names of Reale, Zucadelli, Salvi, Castelli, Cortu, Dalluscek, Castellano, Portula, Sassi, Montagnini, Paroletti, Albertazzi, Praxa, and Bronzini, all of whom wrote treatises, commentaries, and encyclopedias of commercial law, deservedly doomed to oblivion.

Such was the state of affairs at the opening of the second half of the 1800s. French legislation and science predominated; the seed of German scholarship in commercial law was near to fruition; but still far from hope of revival was the once eminent learning of Italian commercial law.

§ 3. **Renascence in Germany; Work of Thöl and Goldschmidt.**

— As the previous period may rightly be called the French period, this about which we propose to speak may be called the German period.

For many reasons Germany was extremely well prepared for a vigorous development of commercial law. The revival of juridical research, due in a special way to the disciples of the historical school, had given to the study of private law a considerable impulse. The German science of private law, which now included such names as Savigny, Puchta, Hugo, Mittermaier, and Beseler, could not fail to turn its attention to the hitherto neglected but nevertheless promising field of commercial law. Furthermore, practical necessities of the first order encouraged this; German commerce was developing vigorously and made its demands heard by legislators and jurists.

The new era of German commercial law opened, then, vigorously between 1840 and 1850. The most important and significant fact of this period was undoubtedly the elaboration and adoption of the Bills of Exchange law of 1847. This was a piece of legislation admirable for its technical perfection and important in its political significance, in that, at a time of political disunion, it was a solemn affirmation of the unity of German legal thought. It may be truly said of this law that it won a greater success than the French Commercial Code; gradually but surely, the German law of Bills of Exchange circled the world. Again recently it triumphed at the Hague Conference (of 1910), which, in drawing up a draft of a uniform law of exchange, reproduced along its fundamental lines the precise principles of the German Act of 1847.

While German commercial legislation was erecting such a magnificent monument to itself, the German science of commercial law was also developing through the special talent of Heinrich Thöl. How Thöl was able, from the fragmentary, incidental, and brief expositions that preceded his own, to pass at one bound, as it were, to the formation of an organized body of doctrine such as is contained in his celebrated treatise on commercial law ("Das Handelsrecht"), the first volume of which dated from 1841, is something which even to-day arouses our admiration. It can be explained only in the light of the notable development to which German science had brought the study of the history and system of the Pandects. Thöl, in fact, created German commercial law almost from nothing, founding it upon an essentially Roman basis. With profound and rigorous logic he succeeded in extracting from that body of legal doctrine, more than a thousand years old, the principal institutions to govern the latest expressions of commercial activity.

This method was not exempt from criticism, but it was, in reality,

the only one with which he could work at that time. Lacking the solid basis of a contemporary legislation, it was very natural and necessary to endeavor to utilize the Roman law by adapting it to the governance of the new relationships growing out of business.

Thöl was criticized for having neglected historical research, and for not having taken economic factors sufficiently into account in the reconstruction of current commercial law. This criticism, which came mostly from Thöl's opponent, Goldschmidt, and which was repeated by others, does not appear to me to strike true. Historical research is useful and necessary when it is a matter of interpreting legal norms which are the fruit of long evolution. But that was not the case with Thöl. His task was more than that of an interpreter of existing legal norms; it was to *create* a new legal system for a series of relations which the Roman law then in force did not cover or regulate. Most needful, certainly, on the other hand, was the study of these actual relations for which he aimed to establish a legal discipline. But Thöl did not neglect the importance of such research; he merely maintained (and correctly) that it was for technical and economic investigation to regulate the relations forming the subject of commerce, and that this was not the immediate objective of legal research. And the result of his work showed that he had followed the sound course. In Thöl, in fact, has been recognized the merit, not only of having founded the German science of commercial law, but also of having constructed so solid a body of legal doctrine that it was able, until the promulgation of the general German Commercial Code, almost to take the place of law. And upon that codification, for which Thöl's work was in the nature of a preparation, the gifted commercialist exercised a decisive influence.

While Thöl, mature in years and learning, and full of achievement as jurist and lawyer, was being hailed as the dean of German commercialists, a young lecturer in the University of Heidelberg, Levin Goldschmidt, founded a review devoted to commercial law (since become celebrated), and resolutely headed a movement to oppose the leadership which had been won by Thöl. Contrary to the latter's tendency to employ in the study of current law, principally if not exclusively, the element of system, and to place particular importance upon the search for guiding principles and dogmas of positive law, Goldschmidt asserted the need of employing, also and primarily, in the study of this very live and progressive branch of the law, research into economics and history. He opposed the

method of "dogmatic isolation"; he maintained the necessity of a treatment in harmony with all the various and fruitful impulses which have been successively felt in the history of our science.

Looking back as impartial and disinterested judges upon the conflict between these two eminent writers, we must indeed admit to-day that, of the two, Thöl, the elder, was really he who had the more modern and precise conception of the nature of law and of the aim of the science of law. More and more, in fact, Thöl insisted on the idea that his aim was the study and exposition of positive law and only positive law, and that in no kind of law would he recognize validity outside of positive law. Goldschmidt, on the contrary, believed in a law derived from the inherent "nature of things" and their relation, alike in all times and all places; hence, for him, the necessity of constant recourse to the "nature of things", which, like all other followers of the historical school, he believed to be the absolute source of law. Every positive law, he said, is the eternal expression and the recognition of those natural norms of law which are permanent and are proper to the relationships of the life of all time. And thus, while Thöl may be placed among the precursors of legal positivism, Goldschmidt (as, indeed, various others of the historical school) must be considered in substance as a late fruit of the school of natural law.

However doubtful may be the philosophical premises of Goldschmidt's doctrine, we must recognize his very high value to the science of commercial law. To have led it along the path of historical research was his principal merit; indeed, we may say that to the historical reconstruction of commercial law Goldschmidt gave the most and best of his forces. Whether the value of the results, especially with regard to the interpretation and practical application of law, equalled the enormous effort expended, is a point upon which, as things stand, one might not care to pronounce definitely. It cannot truthfully be denied that, from the point of view of application and interpretation, historical research is less fruitful in commercial law than in other fields of law. In a field like that regulated by commercial law, which is in a continual state of transformation and evolution, the number of rules and institutions of early origin, whose value cannot be appreciated except through long historical investigation, is relatively rather few; and it is natural that present principles, evolved under the pressure of requirements that are modern and always felt, have less need of historical study to be correctly understood and applied. In commercial law the contrary phenomenon occurs to what we

observe in other fields of law, for example, in procedure. In these we observe the survival, intense in force and vast in scale, of forms and rules originating in other epochs to meet other needs; but in the field of commercial law this phenomenon is apt to be more rare. Rules that no longer answer the exigencies of commerce are rapidly eliminated; and if any continue to remain nominally in force, their interpretation no longer presents any interest, simply because it is useless to interpret rules that are no longer applied. All this, of course, does not take away the ideal and scientific value which always attaches to any historical research, in the field of commercial law, as elsewhere. From this point of view Goldschmidt still remains the supreme master to whom we are all indebted. Furthermore, Goldschmidt labored so long and so profoundly outside the historical field that he must be considered as one of the patriarchs of the German science of commercial law.

§ 4. **The German Commercial Code of 1861 and its Influence.** — German commercial law had the fortune and the merit of being able to produce quite early (scarcely twenty years after the publication of the first volume of Thöl's treatise) such a legislative work of distinction, in respect to both form and substance, as the general German Commercial Code. This Code, admirable for its precision, its arrangement, and its completeness, marked, like the Napoleonic Code, an important date in the history of commercial law. The French Code was the first to affirm clearly the objective character of commercial law, subsuming also into this law the isolated acts of commerce occasionally performed by non-merchants. The German Code of 1861 later enlarged the sphere of application of business law, placing under commercial law also those acts which were unilaterally commercial, — that is, all those acts which reflected a mercantile operation from the point of view of but one participant. It was an innovation of enormous practical importance, when we reflect that by virtue of this principle, it is enough to have contracted with a merchant (that is, it is enough to have accomplished one of the most frequent and usual acts of life), to come within the application of commercial law.

If the influence which this code exercised is not comparable to the French Code, it was nevertheless considerable. Promulgated in Austria, where it is still in force, it influenced in a notable measure the legislation of Hungary, Holland, Denmark, Sweden, Norway, Russia, Switzerland, and of the various Balkan countries.

With the law of Bills of Exchange of 1847, the Code of Commerce of 1861, and the Bankruptcy law of 1877 (which devised a rapid and

effective procedure, common alike to merchant and to non-merchant), Germany possessed a body of commercial legislation that was original and thorough. Now if to this solid element of legal progress be added a wealth of literature, vigorous and full of profound and original research, and a learned and sane judicial practice, we can easily understand the reasons for German leadership in the field of commercial law during the second half of the 1800s.

It is possible here to make mention of names only within the most restricted limits. But one cannot fail to record, among the very numerous body of German commercialists, some of those to whom our science owes the liveliest gratitude: Kuntze, Endemann, Kohler, Riesser, Pappenheim, Gierke, Behrend, Lehman, Grünhut. Through these authors whole bodies of commercial law neglected by French legislation and jurists found satisfactory legal foundations: the theory of sources was elaborated; that of commercial transactions was revised and systemized; the theory of instruments drawn to bearer was developed upon a sound plan; that of the bill of exchange was reformed; the contracts of carriage, insurance, and account-current were studied; the concept of agency was fixed and its theory was made clear; the moment at which a contract is closed was established, and the principle of contracts between parties at a distance was examined. Everywhere are the profound and enduring traces left by German science during this period.

One should not conceal the fact that this enthusiasm for research has markedly diminished since the promulgation of the German Civil Code of 1896. Civil codification in Germany marked the commencement of the decadence of commercial studies. The coincidence was not merely accidental; it resulted from causes that are not difficult to explain. Until the adoption of the Civil Code, the fact that the Commercial Code was the only code of private law in force in Germany greatly aided the development of commercial law; for as commercial codification preceded civil codification, the Commercial Code had been employed in the regulation of some matters not strictly commercial, and was continually drawn upon by the civilists to provide rules for those new civil relationships for which the Roman law was insufficient. After the Civil Code was published, it was thought necessary to rob the Code of Commerce of all that did not strictly relate to commerce. There resulted the revised Commercial Code of 1897, in which commercial law has reverted to its status as a law for merchants only, and the

entire legal discipline of commercial relationships has been reduced to a much smaller number of rules of a professional character. When the practical importance of the study of commercial law was thus diminished, it began to be neglected, and the whole attention of German jurists was and remains concentrated upon the stupendous work of the civil codification. To this must be added the fact that, even in the field of civil law, codification has had the effect of lowering the level of legal study. When the freedom of movement and research was lost that produced a system lacking a code and subject through centuries to the elaboration of jurists, as was the Roman law of Germany, the German science of civil law seemed to have received a blow. From the courage and patience characteristic of its dogmatic principles, it descended to the more ignoble labor of a cumbrous exegesis. This crisis in the civil law has naturally had its reaction on commercial law, and has aggravated the causes of the decadence of commercial studies which began more than ten years ago.

§ 5. **France since 1850.** — Rather less complex and important has been the history of commercial law in France during the last fifty years. The wonderful vigor of the first half of the century suffered a check in the ten years that followed 1850, when the decadence began. Little interest attaches to the legislative activity of this period, since neither the law of 1867 nor of 1893 on companies, nor that of 1887 on insolvency, are marks of original and fruitful legislative activity. After the production of a few commentaries and treatises of some value, such as those of Alauzet, and of Delamarre and Lepoitvin, authors continued for years and still continue to copy the older literature without endeavoring to improve upon it. French science for the last fifty years has been living on the capital accumulated in the first half of the last century. The inheritance was rich; but no wealth is inexhaustible when it is consumed without renewal. Now the truth is that France has produced very little in the last ten years in the field of commercial law; even the largest and most well-known treatise, that of Lyon-Caen and Renault, is but an encyclopedic compilation, diligent and accurate, of all that has been written and decided in France in commercial matters. But it is not a work of any original value. There have been efforts to discover new instrumentalities: suffice to mention the names of Wahl, Saleilles, Lévy-Ullman, and above all of Thaller, to whom especially the French science of commercial law owes great thanks. But these stand out only as isolated efforts alongside the great mass of compilations

which repeat to satiety what has already been written in Pardessus or Vincens, in Bravard-Veyrières or Besplay, in Massé or Alauzet.

§ 6. **Italy since 1850.** — It remains to speak of Italy. The deplorable state of the study of commercial law, which still continued toward the middle of the 1800's and until political unity was obtained, produced legislative consequences that were not to be evaded. The first Commercial Code of the Italian Kingdom, adopted in 1865, came into being without the support of any solid preparation by jurists or courts, and was, in reality, a mediocre revision of the Code of King Albert of 1842, which in turn was an almost exact reproduction of the Napoleonic Code, modified by the law of 1838 upon bankruptcy. About this mediocre code there grew up a literature that was commonplace, but somewhat superior to that of the previous barren period. Imitation of the French commentators still persisted; but here and there, especially through the influence of Filippo Serafini and the work of Ercole Vidari, there began the systematic study of the institutions of commercial law, on the model of what had been done in Germany. In such surroundings was planned, discussed, and formulated the new Commercial Code of 1882, the preparatory work of which had begun in 1869. It was a labor, indeed, of willing and talented men, but there was lacking the basis of a national tradition, of a scientific development that was truly Italian; and they had to be content with borrowing the various elements of reform here and there from foreign legislations. And since in their diligence they did not desire to imitate one legislation alone, but took one institution here and another there, they enjoyed the illusion of having produced a complete and perfect work and of having endowed Italy with a commercial code superior to any then in force. They had instead created a mosaic, in which the general principles were taken chiefly from the German Code, the law of bills of exchange from the German ordinance of 1847; of companies from the Belgian law of 1873; maritime law from the French Code; and bankruptcy from the French law of 1838.

Only since 1880, that is, since the adoption of the Commercial Code, did the period of true renaissance of the study of commercial law begin in Italy. Two lines of influences brought this about. On the one hand were the improvement in the economic conditions of the country and the constant renewal of business activity, which, beginning after 1870, has continued constantly to this day in spite of the check due to the crisis of 1890 to 1896. On the other hand was the rise of the study of Roman law, which began

also after 1870. From Roman law, as always happens, came light. And when the study of Roman law, especially through the work of Filippo Serafini, Vittorio Scialoja, and Carlo Fadda, had attained a certain point of development and diffusion, knowledge of method was spread, and produced in commercial law, as in civil and public law, the movement which was to lead to the reawakening. In this the greatest share of merit undoubtedly belongs to Cesare Vivante, who succeeded in opening a new path for the Italian science of commercial law. Between the strictly exegetical method of the French and the historical and dogmatic method of the Germans, Vivante sought, by investigating the technical and economic nature of commercial relations, to find the elements of a legal reconstruction that would be more alive and responsive to the real exigencies of business. His insistence of this direction was not entirely new; but new, certainly, was its application and new above all were the results obtained. Through Vivante to-day the Italian school of commercial law has established itself with traits of its own, alongside the French and the German schools. Like the former it values exegesis, and like the latter it values system; but from the French it is distinguished by a deeper analysis of jural concepts, and from the German by a more accurate study of the facts and by a quicker appreciation for the reality of social relations. Italian commercial text-writers have made a particularly notable progress in the last ten years, chiefly in the work of the excellent "*Rivista di diritto commerciale*", perhaps the best of all the reviews of its kind, Italian or foreign. Sraffa, who directs it along with Vivante, has succeeded in gathering about him the best scholars of civil and Roman law and of legal history, and they have brought the treasures of their learning and their experience to the elaboration of the new Italian commercial law.

Thus Italian science has succeeded upon several points in pronouncing a word that must remain definitive. One may mention particularly the general theory of instruments of credit, including those made to bearer, to order, and to specific persons, which we owe to Vivante; the demonstration of legal personality in commercial associations, by Bonelli; the relations of principal and agent, explained by Sraffa and Vivante; the distinction between moratory and compensatory interest, by Bolaffio; the doctrine of silence in the acceptance of contracts, by Bonfante. And in this brief mention we have not included the varied subjects in which the studies of the Italian commercialists have greatly contributed to the advancement of this very live and progressive branch of legal

science, — studies which range from the doctrine of commercial acts to bankruptcy, from the theory of association to insurance, and include almost the entire field of commercial law.

Undoubtedly Italy is in a period of leadership, in notable contrast with the decadence of commercial studies in some other countries. May it not be that some day once more, as in the centuries long passed, Italy's may be the distinction of shaping the laws of the world's commerce?

PART III

THE MOVEMENT FOR THE INTERNATIONAL
ASSIMILATION OF LAW

CHAPTER X. THE BEGINNINGS OF THE INTERNATIONAL ASSIMILATION OF COMMERCIAL LAW.

CHAPTER XI. THE PROGRESS OF THE UNIFICATION OF MARITIME LAW.

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CHAPTER XIII. THE HARMONIZATION OF THE RULES FOR CONFLICT OF LAWS.

CHAPTER XIV. A WORLD COMMON LAW : ITS NEED, ITS SCOPE, AND ITS PROSPECTS.

CHAPTER X

THE BEGINNINGS OF THE INTERNATIONAL ASSIMILATION OF COMMERCIAL LAW

BY GEORG COHN¹

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| § 1. Interchange of National Laws. | § 10. Difficulties in the Way of Uniformity. |
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§ 1. **The Interchange of National Laws.** — "Nature herself," says Lord Bacon, "supplies a common wellspring of justice, at which all laws take their origin; yet the laws in different lands differ, just as the brooks which come from the same spring take on the color of the soil over which they flow."²

However plausible such a comparison may appear, it is true to a limited extent only. Even if we should substitute for the laws of

¹ [Professor of German Private Law, of Commercial Law, of German and Swiss Legal History, and of Patent, Trademark, and Copyright Law, in the University of Zürich; formerly Professor in the University of Heidelberg; associate editor of the "Zeitschrift für vergleichende Rechtswissenschaft."

This Essay was published in 1888 as one of three addresses on related subjects ("Drei Rechtswissenschaftliche Vorträge", Carl Winter, Heidelberg).

The sequence of historical events, on the topics here covered, has been brought down to date, in the field of the law of Commercial Paper, by ERNEST G. LORENZEN, Professor of Law in Yale University, and a member of the present Editorial Committee; and in the other fields, by Chapter XII following. — A small portion, duplicating the events recorded in other chapters, has here been omitted. — Ed.]

² Cf. Hamaker, "Das Internationale Privatrecht, seine Ursachen und seine Ziele", 1878, p. 9.

various lands those of various nations, the words of the great English philosopher would be but partially true. What Bacon seems to overlook, and what even Montesquieu does not seem to comprehend with sufficient clearness,¹ is the principle of organic evolution of law. Even within the same nation and in the same region, the laws gradually change their color. The law of each individual nation also has its youth, as well as its age. The factor which far more truly determines the color of the law and might with greater justice be compared to the brook in Bacon's illustration, is the stage of civilization a nation has reached, or the degree of its intellectual development, as determined by its religion, its education, its science, and its economic activities.² Wherever we find the same stage of civilization, there we shall also find a surprising similarity in the law. The startling contrast between the modern laws of what are now civilized nations and the primitive legal customs of those tribes we are wont to call "savage", disappears if only we go back far enough to the days where the former first emerge into the light of history. Then we find in them also such institutions as the blood feud, purchase of brides, the creditor's right to kill his debtor, and slavery.³

However, it is not merely the application of Bacon's metaphor that does not altogether fit; we might also criticize the illustration itself. For is it always the soil of its bottom from which the brook takes its color? Do not strange affluents and atmospheric precipitation change its tints, not to speak of foreign matter deliberately thrown into it? And is it different with law? We need but recall the numerous "receptions", or borrowings of laws from foreign nations, in order to recognize that the exclusive emphasis placed on the territorial or national element in the growth of law is equivalent to the exaggeration of an idea which in itself is not without truth.⁴ There is no people in existence that has not borrowed a portion of its law.

It may be doubtful to what extent that ancient seat of civilization, Egypt, influenced Mosaic or Hellenic law; but we know how much Rome borrowed from Greece and the East,⁵ and how after-

¹ Cf. *Laboulaye*, in "Revue de droit international", Vol. 1, p. 170: "This confusion of different ages, this failure to recognize the law of development, is to-day for us the greatest defect in 'L'esprit des lois.'"

² Cf. especially *Kohler*, "Das Recht als Kulturersehnung", 1885, p. 6, where he speaks of "law, the child of civilized life."

³ *Kohler*, *loc. cit.*, pp. 7, 17, 20 *et seq.*; *Kohler*, "Shakespeare vor dem Forum der Jurisprudenz", 1883, pp. 7, 131 *et seq.*

⁴ Cf. *Jhering*, "Geist des Römischen Rechts", I, pp. 5 *et seq.*

⁵ Cf. *Revillout*, "Les obligations en droit égyptien comparé aux autres droits de l'antiquité."

wards these borrowings were passed on to the whole of Europe.¹ During the Middle Ages, when people were prone to submit to authority, when there was a lack of historical criticism and the sense of nationality was comparatively little developed, we find throughout several centuries a series of such borrowings on a large scale. Not merely did Rome with its law for a second time conquer the Western world; Mosaic rules also, in the train of the Church, penetrated the Occident from the Orient, changing the criminal laws, establishing the law of tithes, multiplying matrimonial incapacities, fundamentally altering the nature of kingship. Italian commercial customs were carried far to the northward; on board of ships, Mediterranean maritime law reached the most remote nations; the law of the Saxons ("Sachsenspiegel") was transplanted to Poland; the law of German cities was brought to Slavic and Hungarian districts. Recent investigations have shown the great influence of Christian, Mosaic, Talmudic, and even Moslem law among the Armenians; and similarly it has been found that Hindu laws were "received" to a great extent by the Burmese.²

Looking at modern times, numbers of borrowings recur, in matters both of form and of substance! The conquests of the French Code Civil survived those of French armies. Such institutions as the State's attorney, juries, representative government, — all these are nothing but foreign law appropriated by one country from another.

The idea of "reception" has become so familiar to us on the Continent that it is an invariable custom for governments, on introducing a bill, to include in its explanatory report submitted to the Parliament, a synopsis of foreign legislation on the subject under consideration. A modern legislator may very properly care far less as to the foreign origin of a legal institution than as to its practical utility.

The nations of Europe, starting perhaps with a small stock of common juristic notions by reason of their common Aryan origin,³ have produced a body of legal institutions and legal rules whose basic similarity is due partly to their similar stage of civilization, partly to these "receptions." This body of law, though not completely identical, is so nearly related and similar that we may very well speak of a general European law, or an international common law.

¹ Voigt, "Das Jus naturale", II, pp. 606, 636, 644 *et seq.*; Kuntze, "Kursus des römischen Rechts", 2d ed., p. 125, § 205, n. 4.

² Kohler, "Recht der Birmanen", in "Zeitschrift für vergleichende Rechtswissenschaft", VI, pp. 161 *et seq.*; VII, pp. 385 *et seq.*

³ Cf. Bernhöft, *ibid.*, I, pp. 5 *et seq.*

To analyze this common possession, to separate what is alike from what is dissimilar, is part of the task incumbent on that youngest branch of legal science, comparative law, or (more correctly) the comparative method of legal science. It is but part of its task, for the aims of that science are higher and greater. Nobody has conceived them more loftily or described them more clearly than Feuerbach, when he says: "Just as the comparison of various tongues produces the philosophy of language, or linguistic science proper, so does a comparison of laws and legal customs of the most varied nations, both those most nearly related to us and those farthest removed, create universal legal science, *i.e.*, legal science without qualification, which alone can infuse real and vigorous life into the specific legal science of any particular country."

Although comparative legal science is yet but a youthful science, yet it has already given vogue to a new, vital, and promising principle, *viz.*: The comparison of laws is followed by the mutual assimilation of laws. The former is engaged in discovering likenesses, the latter produces likenesses; one attempts to establish a systematic theory, the other aims to create a practical code. The international codification of law! It is not very long ago that such a proposition would have produced nothing but a smile. The time was that a codification of the law of nations, and still more a code of the civil law common to the whole world, would have been considered a wild flight of fancy. Even to-day we could not but reject as utopian any proposal to draw up a universal code containing a complete body of municipal law for all nations.

Fortunately, however, those who are interested in the problem of assimilating the laws of various countries have in mind no such plans as that. They willingly leave them to idealistic dreamers, who may amuse themselves with them as others have amused themselves with world governments, world languages, and the like. The promoters of the international assimilation of law, on the other hand, are experienced lawyers, practical men of business, and, behind them all, even the European governments themselves. They are looking for nothing but what is within the bounds of really urgent needs, in order to remove differences that have no sort of justification.

§ 2. (I.) **Mutual Assimilation of Commercial Law; the Beginnings of the Idea.**—The idea of legal assimilation has arisen most actively, and probably earliest also, within the field of commercial law, although it is not confined thereto. For commercial law is

least of all tinged with national idiosyncrasies; it is not only international in its traits, but even (to use the expression invented by Goldschmidt) anational.¹

As far back as the beginning of the 1800s, during the discussions on the draft of the French Code of Commerce, the desire was expressed to create a commercial law which might be adopted as it stood by all the commercial nations of the globe. Thus it was prophesied by the Councillor of State, Corvetto, that the bill he advocated before the Legislative Council was destined to become "the common law of Europe."² Although this forecast has not been verified literally, yet the fact remains that the French Code of Commerce has exerted the widest influence on the modern commercial law of most countries in both hemispheres.³

It was expected that the Code of Commerce would drive out other systems of law and thus dominate the field. The idea of assimilating the laws of different countries by treaties accepting a uniform law was far from the minds of its promoters. Nevertheless, it is true that assimilation has been furthered materially by the fact that so many nations did adopt or copy this code, and perhaps assimilation would never have become possible without the French Code. But to arouse a desire for assimilation of laws, it was first necessary for legal science to do the preliminary labor of comparison of laws. As one might say, it was first necessary to strike a balance, or to take an inventory of those legal principles already common to the various nations.

This task was undertaken, as far back as the year 1844, by a French writer, Antoine de St. Joseph, who published a parallel between the commercial laws of forty-four States. With all its merits, his work is, in some parts, not altogether reliable.⁴ Six years later, an Englishman, Leone Levi,⁵ attempted to solve the same problem. His work is of greater importance, not merely because the author compares the commercial laws of fifty-nine States with those of England, but especially because, in his preface, Levi for the first time gave distinct expression to the idea of a common, international commercial code, and at the same time outlines a complete plan for realizing this idea.

In his preface, which is addressed to the Prince-Consort of Great Britain, Levi acknowledges that two events had confirmed his

¹ *Goldschmidt*, "Handbuch", I, p. 375.

² *Cf.* "Journal des Économistes", 3d series, XI, pp. 209, 216.

³ *Cf.* *Goldschmidt*, "Handbuch", I, pp. 56, 212 *et seq.*

⁴ *Cf.* *Goldschmidt*, "Handbuch", I, p. 30.

⁵ *Cf.* as to his work, *Goldschmidt*, *loc. cit.*, pp. 30 and 31.

conviction that a formal assimilation of commercial codes, which even then covered subject matters so nearly related, would be feasible. One of these was the enactment of the uniform Negotiable Instruments law of the German Confederation, which succeeded in abolishing by one stroke nearly sixty different bodies of law. The other event was the opening of the International Exposition at London, promoted by the Prince-Consort. It is no mere accident that the opening of the International Exposition and the publication of a plan for assimilating the commercial laws should occur at the same moment. The same note was struck at nearly all subsequent world's fairs. The universality of commercial intercourse, so clearly brought out by international expositions, could not but awaken the idea of the universality of the law of such intercourse. Even though there was some superabundance of phrase-making; even though chilling disappointments followed expectations that were a little oversanguine, yet we may enumerate as one of the most beneficial effects of international expositions this arousing of interest in the movement for legal assimilation.

Our English author was one of those who were thus filled with sanguine hopes by the Exposition. His plan was to call two international conferences, composed of three delegates each from every principal commercial city, and to offer a number of prizes; and he expected by this scheme to see the great work completed in not more than two or three years; he even prepared for the future growth of his universal commercial code by the method of holding periodical delegate conferences, "*adjuvandi, supplendi, corrigendi causa.*" The Prince-Consort, although not failing to recognize the merits of Levi's proposition, proved to be less optimistic; in fact, he did not consider the plan practicable.¹ And in other quarters also, the idea of a universal commercial code continued to be flouted.²

§ 3. **Progress of the Movement.** — Yet the idea conceived by the English jurist was not to go wholly unrecognized; it found a responsive hearing in a quarter to which it was not primarily addressed, — on the other side of the British Channel, in the Tuileries.

¹ Cf. *Levi*, "Commercial Law, Its Principles and Administration; or the Mercantile Law of Great Britain compared with the codes and laws of commerce of the following (59) mercantile countries", 1850, Vol. I, preface. See also *Goldschmidt*, p. 30; *Thöl*, "Handelsrecht", pp. 34, 36.

² *Burchhardt-Fürstenberger*, "Entwurf zu einer Schweizer. Wechselordnung mit Motiven", Zürich, 1857, p. 12.

Napoleon III was fond of adopting clever ideas, especially those of an international character. Moreover, he was accustomed to regard movements towards a world union as part of his inherited programme, for it was from St. Helena that the watchword had issued: "Une loi, un poids, une monnaie, une mesure."¹ Consequently, Louis Napoleon deemed the proposals of the British writer at least worthy of careful examination. A committee was therefore appointed, composed of three members of the Legislative Section of the Council of State; M. Suin being the chairman. Unfortunately, Suin (as is admitted by his own countryman, Parieu) was not without that sort of feeling of national superiority which had led M. Corvetto to assert in 1807 that "the commercial code then drawn up at Paris was to become the law of all Europe." While Suin would have been pleased to see the adoption of the French Commercial Code by all the other nations, he was averse to the idea that France also should concede something and should assimilate her own law to that of other peoples. Nevertheless, by 1855, even Suin was obliged to admit that there were some parts of commercial law in which "the task of making the law uniform would not encounter the same insuperable obstacles as in the rest of the law of commerce." As such parts Suin designated (in accord with the entire committee) negotiable instruments, bottomry, and transportation by sea and land.²

Although the whole matter was put at rest, so far as Napoleon III was concerned, by Suin's report, it was impossible that so grand an idea as that of a universal law of commerce should be laid aside entirely. It emerged again and again, sometimes in its original, sometimes in a modified form. It was energetically advanced by Louvet, the president of the Commercial Court of Paris, in his inaugural address, in 1862. In the French Legislature, the question was raised by Garnier-Pagés, in an interpellation directed to the Government.³ During the same year, the "Association internationale pour le progrès des sciences sociales" was founded in Belgium, and its First Section was devoted to comparative legal science. At the four congresses held by this important body during the years 1862-1865, a number of questions regarding the law of commercial intercourse were discussed in detail, espe-

¹ Cf. "Journal des Économistes", 3d ser., VI, p. 321.

² "Journal des Économistes", 3d ser., XI, p. 217, in *Parieu's* reply to Charles le Touzé.

³ "Journal des Économistes", 3d ser., X, p. 71, note 2.

cially the international recognition of foreign corporations and the preparation of an international law of negotiable instruments.¹

A further stimulus was given by the two International Expositions at Paris, in 1867 and 1878. In 1867, an "Association internationale pour faciliter le développement du commerce", which indeed came to nothing, framed plans of such far-reaching scope as the "uniformity of commercial legislation and jurisdiction", and even the "uniformity of private law so far as it relates to inheritance, sales, mortgages, and property of foreigners."² In 1878, besides three congresses dealing with the various species of intellectual property, and an international congress for the promotion of means of transportation (which also discussed the law of railway freights), there was held an "International Congress of Commerce and Industry." The latter not only expressed a desire for an international commercial code, but appointed a committee to draw up a set of fundamental principles for such a code, which were to be submitted to a new congress to be called at Brussels in 1880.³

§ 4. **Practical Fruition of the Movement.** — The failure of Levi's plan is important not only from a historical but also a practical point of view, though that importance may be negative only. It confirms the experience that one injures the cause he would serve by demanding too much. The whole wide field of commercial law cannot (in our opinion) be regulated internationally at one stroke; nor even is such immediate regulation of the whole desirable. For instance, one can hardly say that the legal differences regarding the position of commercial employees have grown intolerable; similarly, the continental system of registration of commercial firms is so closely connected with public administrative law that one could scarcely count on getting all countries to agree on

¹ Cf. *T. M. C. Asser*, "Droit international privé et droit uniforme", in "Revue de droit international et de législation comparé", XII, pp. 3 and 4; the same, in "Annales de l'Association internationale pour le progrès des sciences sociales", "Congrès de Gand", 1863 (Brussels, 1864); *Pappenheim* in "Zeitschrift für Handelsrecht", Vol. 28, p. 512. The credit for these Congresses is due largely to a number of lawyers of European reputation, Westlake, of England; T. M. C. Asser, of Holland; and M. Rolin-Jacquemyns, later minister of justice in Belgium.

² Cf. the report by *Bénard*, at the July meeting of the Paris "Société d'économie politique", which has a very resigned sound. ("Journal des Économistes", 3d ser., VII, p. 1161.)

³ "Revue générale du droit etc. en France et à l'étranger", II, p. 533. The "Congrès international du commerce" met at Brussels in 1880 and discussed the Bremen draft regarding the law of freightage (*Thaller*, in "Annales de droit commercial", I, 1886, p. 30). I have been unable to learn whether other matters were considered at this meeting.

the method.¹ On the other hand, there are a number of subjects in which there can be no doubt of the urgent necessity of uniform law, and for which important preliminary work has already been accomplished. Such subjects are: the law of railway freights; the law of negotiable instruments; a portion of maritime law; and the law of intellectual property. A number of very important bodies have also expressed themselves in favor of a similar limitation of the task. These are the International Association for Reform and Codification of International Law; the Institute of International Law; and the Belgian Government.

The Association first mentioned was originally by no means an organization of lawyers only. It was founded by a clergyman of Boston, Dr. James B. Miles, who believed that the treaty of Washington and the Geneva arbitration were about to inaugurate the era of perpetual peace. The Association, jointly with the Peace League, at first aimed at nothing less than the establishment of compulsory arbitration and the codification of the entire international law. These were still the objects pursued at the first two meetings held, those at Brussels in 1873 and at Geneva in 1874. However, the very next year a gratifying change of opinion was noticeable. The Association decided to let its original ideals drop into the background, in favor of more proximate and more easily attainable objects. The alliance with the Peace League was severed. Uniform private law, more particularly certain portions of the law of commerce, negotiable instruments, intellectual property, and maritime law, were included in the field of serious discussion. A number of prominent German lawyers, in 1876, founded a German branch association at Bremen.²

The Institute of International Law was organized in the same year, at the same place, and in part by the same persons, as the Association just described. However, it now occupies another, and one may well say a higher position than the latter. While the Association is open to all persons interested in international law, the Institute is rather an Academy limited to a small number of

¹ Cf. *Asser's* report in "Annuaire de l'Institut de droit international", VI, 1883, p. 77. *Lyon-Caen*, in *Clunet's* "Journal", XII, p. 593. Also *Thaller*, *loc. cit.*, p. 32.

² On the history of this Association, cf., *Clunet's* "Journal de droit intern.", I, p. 253; II, p. 402; III, pp. 263, 418; IV, p. 574; VI, pp. 216 *et seq.*; X, p. 564; "Revue de droit intern.", V, pp. 616 *et seq.*; VII, pp. 307 *et seq.*; VIII, p. 603 *et seq.*; IX, pp. 405 *et seq.*; "American Law Review", 1875, IX, pp. 185 *et seq.*; *Goldschmidt*, in "Zeitschrift für das gesamte Handelsrecht", XXIII, p. 222. Cf. also *Asser*, in "Revue de droit intern.", XII, p. 6; "Annuaire de l'Institut", V, pp. 206 *et seq.* The German branch association has been dissolved.

members elected by co-optation, and consists of the most prominent scholars in international law in both hemispheres. It is a corporation with the avowed purpose of guiding the development of the law of nations and of becoming the keeper of the juristic conscience of the civilized world.¹

The Institute, at its very foundation, resolved to establish rules for those situations commonly (but not quite accurately) termed "conflicts of laws", *i.e.* private international law. These rules were to solve questions of the territorial validity of law, — for instance, whether in certain cases it may not be the duty of a German court to apply, not German, but English, Italian, Spanish, or Chinese law, as the case may be. In discussing these difficult problems, commercial law was touched upon, and on motion of Asser, a Hollander, and Sacerdoti, an Italian, the following resolutions were adopted at the Turin meeting:

"1. The most thorough and efficient means of eliminating the conflict of laws would be the regulation of several branches of commercial law by uniform legislation.

"2. Uniformity is especially desirable as regards negotiable and other commercial instruments, bills of lading, and the principal topics of maritime law."²

Finally, the Belgian Government lent its support. In 1885, in preparation for the World's Fair at Antwerp, several members of the cabinet petitioned the King for the calling of an international commercial congress to be held at Antwerp. In this petition the usefulness of a uniform law of commercial intercourse was emphasized, in the following terms: "Commercial relations are to-day principally of an international character. They are becoming so more and more, and what new flights might they not take, if they were freed from the fetters, difficulties, uncertainties, and expenses growing out of differences in the law?" It was added that such an attempt would indeed take a long time to accomplish, and would have to be carefully prepared; and the petitioners continue: "For the present, uniformity might be attained without serious difficulties in several parts of commercial law." The Belgian ministers also designated as subjects thus ready for unification, negotiable instruments, bills of lading, and maritime law.³ On the King of the Belgians assenting to this proposal, an official

¹ "Revue de droit intern.", V, pp. 667 *et seq.*, 683 *et seq.*

² *Cf.* "Annuaire de l'Institut de droit intern.", VI, pp. 76, 92; VII, p. 22.

³ The "Rapport au Roi" and "Arrêté royal" of Feb. 27, 1885, are printed in *Clunet's* "Journ. de droit intern.", XV, pp. 124 *et seq.*

committee of organization was appointed. On September 27, 1885, delegates of fifteen governments, seventeen law faculties, nine bar associations, numerous chambers of commerce, commercial courts, mercantile associations, banking and insurance institutions, associations of lawyers and legal periodicals, met at Antwerp. The governments of Germany, England, and Austria were unfortunately unrepresented, but on the other hand delegates came even from America and Asia. In accordance with a resolution of the committee on organization, the Congress excluded the law of transportation and limited its labors to a consideration of negotiable instruments and maritime law. Even these two subjects the Congress (which was in session but one week) could not complete, notwithstanding the great zeal and successful work of its members. At the unanimous request of the Congress, the Belgian Government authorized the re-assembling of the delegates.¹ For extrinsic reasons, the meeting had to be postponed again the following year, but was called to assemble at Brussels in 1887.

We may now turn back, and trace more in detail the results of these endeavors to create a uniform law of commercial intercourse in the most important parts of the field. We confine our survey to the three great subjects of Railway Freights, Negotiable Instruments, and Maritime Law of General Average.

§ 5. (II.) **The Law of Railway Freights.** — The merit of being the first to suggest uniform legislation for railroad freights belongs to two Swiss barristers, G. de Seigneux, of Geneva, and H. Christ, of Basel. These two lawyers, in 1874, offered in the Swiss Federal Assembly, which was then discussing a bill to regulate railroad freights in the Confederation, a resolution asking for an international agreement upon at least four fundamental issues in the law of railway freights.² The occasion for this motion was the fact that during the war of 1870 the transportation of goods on Swiss railroads had increased materially and had led to a large amount of litigation. The resolution was referred to the Federal Council, which took the matter up with the officials at Vienna, Paris, Berlin, and Rome, and found everywhere a favorable reception.

¹ Reports on the Congress are given by *Lyon-Caen*, *loc. cit.*, XII, pp. 593-645; *Lewis and Speiser* in "Zeitschrift für Handelsrecht", Vol. 32, pp. 87-132; *Barclay*, in "Law Quarterly Review", 1886, January number; and *Daguin*, in "Bulletin de la Société de législation comparée," 1886, pp. 570-653. Further literature, see note 67 and *Daguin*, *loc. cit.*, p. 61, n. 2.

² The petition is printed in *Eger*, "Die Einführung eines internationalen Eisenbahnfrachtrechts", p. 44. — Cf. also, *de Seigneux*, "Rapport du projet de convention internationale présenté au congrès international pour le développement et l'amélioration des moyens de transport, tenu à Paris le 22 J. 1878", page 9.

The Austrian and German governments, however, requested more detailed propositions. In accordance with this request, the Federal Council caused to be drafted a convention containing thirty-eight sections.¹ This draft was rather a torso of a bill regulating freights, than an actual code covering the whole subject. Substantially, it was based on the Swiss federal railway transportation bill, which in the meantime had become a law. The draft, accompanied by a report, was communicated not only to the four governments originally addressed, but to all countries which had direct railway connection with Switzerland,—in other words, to all countries of the European continent except Greece, Turkey, Sweden, and Norway.

Before the various governments' representatives had assembled to discuss the subject, the voices of legal scholars made themselves heard. Professors of commercial and international law, as well as practical railroad officials, were ready to appreciate the initiative taken by the Swiss; among those expressing their views were Laband,² Sachs,³ von der Leyen,⁴ Asser,⁵ Hovy,⁶ Rivière,⁷ von Bulmerincq,⁸ Ebermann⁹ and Eger.¹⁰ They were all agreed regarding the need of uniformity. It was indeed intolerable that when *e.g.* a parcel of goods was forwarded from Heidelberg to Lyons, passing through regions in which three different systems of law were in force, the French railway authorities might become liable for a claim for which there was no recourse to the Swiss or the German railways.¹¹ In addition, there was a chaotic mass of unsolved problems regarding the duty of the carrier to accept freight, the right of disposal by the consignor, recourse against prior parties, liens, the statute of limitations, and many other rules.¹² Hovy, a Netherlands barrister, cited a case arising in his own practice, in which a merchant of Amsterdam had consigned to France

¹ Printed with the "Motiven", by Eger, *loc cit.*, pp. 21–44. The draft was prepared by Prof. Fick, de Seigneux, and Christ.—*Cf. von der Leyen*, in "Zeitschrift für Handelsrecht", Vol. 25, pp. 241 *et seq.*

² "Zeitschrift für das gesammte Handelsrecht", Vol. 22, pp. 590 *et seq.*

³ *Loc. cit.*, XX, p. 660.

⁴ *Loc. cit.*, XXIII, p. 612.

⁵ "Revue de droit intern.", X, pp. 101 *et seq.*

⁶ *Loc. cit.*, IX, pp. 380 *et seq.*

⁷ *Loc. cit.*, VII, 143 *et seq.*

⁸ *Loc. cit.*, X, pp. 83 *et seq.*

⁹ "Juristische Blätter", May, 1878.

¹⁰ Eger, "Die Einführung eines internationalen Eisenbahnfrachtrechts"; Thaller, p. 31, would have preferred the conference to make rules for decision of cases of so-called conflicts of laws only.

¹¹ *Cf.* the petition and memorandum of de Seigneux and Christ, Eger, *loc. cit.*, pp. 7, 50.

¹² *Cf.* "Zeitung des Vereins deutscher Eisenbahnverwaltungen", 1878, Nr. 48, June 24; see also G. de Seigneux, "Rapport", 1878, pp. 4 and 5.

a car-load of coffee, which was destroyed by fire during the Paris Commune. He had to deal with no less than five railways, either as original defendants, or defendants brought in by the others. Each of these had its own solicitor and its own barrister, and each pleaded different defenses, in part based on different railway laws. What complications in a law-suit very simple in itself! What an enormous burden of costs for the defeated party!¹

And as all were in accord as to the need of common regulation, so were they as to its feasibility. For notwithstanding the great diversity of freight regulations in detail, they could be reduced, in all essentials, to two types, and even these have a common basis. This basis is found in the provisions of the French Code of Commerce regarding the ordinary contract of freight transportation. The French rules have been adopted practically unchanged by Belgium and Holland. The German Commercial Code, on the other hand, as well as the railway traffic regulations of May 11, 1874, based thereon, has introduced considerable deviation from the French law, and at any rate has the formal advantage of much greater comprehensiveness. This is not surprising, for the French Code was adopted before the advent of railways. It required the decision of a court to establish that the rules regarding common carriers of freight were applicable to railways. Moreover, many topics were left unprovided for, and were covered by the freight regulations of the various railway companies themselves, which did not by any means tend to improve the certainty of the law. The entire German Commercial Code and traffic regulations were in force also in Austria-Hungary, and by convention the traffic regulations had been adopted for the inter-railway business of more than one hundred and twenty railways in Germany, Austria-Hungary, Belgium, Holland, and Russia. The Swiss railway law of 1875 occupied a middle ground between the original French and the derivative German law; and the same was true of the Swiss international draft based on it.²

§ 6. **The Berne Draft Convention.** — On May 13, 1878, an international freight law conference met at Berne. Nine continental countries were represented: Austria-Hungary, Germany, France, Russia, Italy, Belgium, Luxemburg, the Netherlands, and Switzer-

¹ Cf. *Hovy*, in "Revue de droit intern.", *loc. cit.* Further cases in *Asser, jr.*, "Internationaal goederenvervoer langs spoorwegen. De Bernsche conventie van 1886", pp. 3, 12, 16.

² *Eger*, pp. 51, 53; *Laband*, pp. 591, 592; v. *Bulmerincq*, "Völkerrecht", p. 277. On the condition of French law, cf. *Thaller, loc. cit.*, p. 32; *Lyon-Caen* and *Renault*, "Précis de droit commun", I, pp. 461, n. 2, and pp. 495 *et seq.*

land.¹ The two men who four years earlier had first suggested international uniformity, de Seigneux and Christ, were accorded the well-merited honor of being elected secretaries. In addition to the Swiss draft, the Conference had before it an alternative draft prepared by the German commissioners, Gerstner, von der Leyen, Meyer, and Rutz; this was limited to foreign freight traffic, but attempted to cover this field completely, and was based substantially on German law.² This draft found the greater number of adherents, and many of its provisions were adopted. In the short time of three weeks, the Conference drew up a new draft, containing fifty-six sections, besides some administrative regulations, which covered not only the entire substantive law of freights but also a number of very important matters of procedure.³ This first Conference draft was in general well received by public opinion, yet there was no lack of proposed amendments by several governments, congresses, associations, and authors.⁴

To consider these suggestions, a second conference took place in the autumn of 1881; and after an interval of five years, in July, 1886, a third one was held, both again at Berne. On July 17, 1886, the revised draft was agreed upon and signed by all the delegates except those of the German Empire; but these also added their signatures in November, 1886.

The Berne Conferences did not limit themselves, however, to drawing up a comprehensive proposition for the law of freights and the conduct of litigation arising therefrom. In addition, a suggestion of the German commissioners was adopted and a set of administrative regulations was drawn up, recommending the establishment of a central bureau at Berne. This bureau was to facilitate financial interchanges between the treaty States, to act as clearing house for information, to publish information of international importance for transportation, to undertake the task of ascertaining whether the international rules adopted were adequate to the demands of traffic, and also in proper cases to make

¹ For the names of the delegates and the attitude of the various governments, *cf. de Seigneux*, "Rapport", pp. 11-14; *von der Leyen*, in "Zeitschrift für Handelsrecht", Vol. 25, pp. 242 *et seq.*

² *Cf. Goldschmidt*, in his magazine, Vol. 34, p. 628.

³ Printed in *de Seigneux*, "Rapport", pp. 34 *et seq.* Also Nr. 53 of "Zeitung des Verbands deutscher Eisenbahnverwaltungen," July 12, 1878. On the discussions at the meeting, *cf. same paper*, Nr. 48, June 24; also *von der Leyen*, *loc. cit.*

⁴ *Cf. Meili*, "Internationale Eisenbahnverträge", p. 35; *von der Leyen*, *loc. cit.*, pp. 246 *et seq.*; "Annales du droit commercial", I, pp. 31 *et seq.*; *Asser jr.*, *loc. cit.*, p. 30; *von Bulmerincq*, *loc. cit.*, p. 277. More references given in *Meili*, *loc. cit.*, p. 34; *Thaller*, *loc. cit.*, and also "Archiv für öffentliches Recht", III, pp. 384 *et seq.*, notes 19-22, 29, 46.

suggestions to the treaty governments and call for a new conference. These were to be held at least once in three years. Besides thus taking the initiative regarding new legislation, the Bureau was to act as arbitrator in disputes between the various railways. On the other hand, the Conference rejected the proposal to establish an international court for that purpose.¹

However, this draft, although it was approved by the representatives of five great powers and four other states of continental Europe, did not immediately become law; it failed to receive the parliamentary approval required by the constitution of several of these States, and therefore was not ratified and published by the governments.² . . .

An eminent commercial jurist of France, Professor Thaller of Lyons,³ in 1886, saw fit not only to make a number of criticisms on the merits of the draft, but also to express a sort of personal grievance because (as he opined) in the Berne draft the German law had vanquished the French law. Nevertheless, he was obliged to concede that, so far as the regulation of freight traffic is concerned, German commercial law is superior to the French. Moreover, Germany also had agreed to certain compromises and had made some sacrifices, such as are demanded as a matter of course from each party to the work of unification.⁴ Even Thaller, however, was not a declared opponent of the draft. At the close of his article, he protested that he would regret having written it if it should seem to be inspired by national animosity against the work of the Conference, and should effect a postponement of its successful accomplishment. Thaller even goes so far as to concede that he would welcome the results of the Berne conferences, if only they be not considered as a precedent for afterwards permitting the entire commercial law of Europe to be attracted into the German orbit.

Under the Berne Convention of 1886, international uniformity would be achieved for foreign traffic only, and even this only where goods are transported from one treaty State to another by a through bill of lading on a railway subject to the convention. All domestic traffic would remain under existing national law.⁵ If, however, the

¹ Cf. *Meili, loc. cit.*, p. 57. Also *Eger*, "Einführung", p. 132.

² [The present status of the Railway Freight Bureau is described in Mr. *Reinsch's* chapter, *post*, p. 432. — Ed.]

³ Cf. *Thaller* in "Annales de droit commercial", I, pp. 32, 318 (1886); see also *Asser, jr., loc. cit.*, p. 31. ⁴ *Meili, loc. cit.*, p. 48, n. 2; p. 58.

⁵ Even the motion to extend the agreement to at least one important point of domestic traffic was defeated. See *Eger*, "Archiv", III, n. 2, pp. 36, 37.

rules of the convention proved their merits in foreign traffic, the time would probably come when the several countries would themselves abolish the dualism of law and adopt for domestic business also the rules in force for foreign traffic. That such a hope is not inspired by unjustifiable optimism is indicated by the circumstance (noted in the discussion by von der Leyen, one of the German delegates) that during the interval between the second and third conferences, two of the proposed treaty governments, Russia and Italy, did in fact adopt certain principles of the Berne draft as their domestic law, and partly in the very words of the draft.¹

§ 7. (III.) **The Law of Negotiable Instruments ; Early History.**—The call for a law of negotiable instruments uniform throughout the world was heard a hundred years before there was a demand for uniform transportation laws.

Bills of exchange were invented to fill the need for obtaining money in foreign places, and were freely used instead of money to effect payments between residents of different cities and countries, especially after their assignability had been legally established in the latter half of the 1600s. Thus a bill of exchange is a true cosmopolite. It wanders over sea and land, often passing through many different nations, and, when dishonored (a fate not as rare as it should be), compelled to travel back again through all these countries to its place of origin. But in the course of these travels it is subject to all sorts of different laws and usages in these several jurisdictions. The fundamental principles of all laws affecting it are indeed similar, on account of their historical derivation and the frequent borrowing of laws; yet there is much contrariety in important details. These legal rules are like children who have an unmistakable family likeness and yet each an individual physiognomy: "*Facies non omnibus una, nec diversa tamen, qualem decet esse sororum.*"² Obviously, it has always been important to know these various laws, and highly desirable to establish a uniform law regarding bills and notes.

The first step in that direction was a comparative study, and an attempt to comprehend diversities and similarities. As far back as 1709, a merchant of Nuremberg, Paul Jacob Marperger, undertook the task of compiling "a fair harmony of the many European laws of negotiable instruments."³ Not much later, in 1721, as a

¹ *Von der Leyen*, in "*Zeitschrift für Handelsrecht*", Vol. 34, p. 302.

² This verse (*Ovid*, "*Metamorphoses*", II, 13-14) has been cited, quite properly, for a number of other institutions of commercial law, e.g. for maritime law (*Dufour*, "*Droit Maritime*", I, p. 90.)

³ *Marperger*, "*Neueröffnetes Handelsgericht*", p. 501.

consequence of the bursting of John Law's stock-jobbing bubble in France and England, a serious financial crisis arose in Germany. Many law suits were lost on account of ignorance regarding foreign laws governing bills of exchange; and this suggested a more thorough study of the subject.¹ Probably the first to express the idea that these laws in the various countries might be mutually assimilated was a Frenchman, Accarias de Sérionne, author of books on "The Wealth of Holland" and "The Advantages derived by Nations from Commerce." In the latter work, which appeared in 1766 both in French and German, the author exclaims: "It would surely be desirable that the form and use of negotiable instruments be governed by a general law, uniform among all commercial nations", and "that the terms of endorsements could not be construed away in any court in Europe, and that both protest and the omission of protest should have the same effect in all countries."² This wish was reiterated, apparently without knowing the work of Sérionne, by a number of German professors of law during the next few decades. The need was manifestly felt more and more.

However, until the middle of the 1800s, there was very little hope of realizing this idea. The jurists, Moshammer, Weisseneck, and Daniels, in referring to the subject, differ from each other only in the degree of their resigned pessimism. Even as late as the year 1842, Mittermaier wrote: "We shall not entertain any hope that the time may be near when all civilized countries will agree upon a uniform negotiable instruments law"; and yet he was so profoundly convinced of the necessity of unification that a few paragraphs earlier he exclaimed: "Bills of exchange, like commerce, belong to the whole world. Without their uniform regulation, there can be no assured stability for commerce."

The resigned attitude of these authors concerning a reform the utility of which they depicted so vividly is easily explained by the circumstances of the time in which they wrote. It would have been fanciful to believe in a unification of all nations as long as in Germany itself there were still nearly twice as many negotiable instruments laws as there were federal States; fifty-nine different statutes were in force in that country, of which nine dated from the 1600s, thirty-one from the 1700s, and but nineteen from the 1800s; while the number of German statutes dealing with the

¹ Cf. my contributions to a uniform law of negotiable instruments in "Festgabe für Bluntschli", 1880, p. 3; *Raumburger*, "Justitia selecta", pp. 14 *et seq.*, and preface, pp. 5-8, 11.

² *Cohn*, *loc. cit.*, p. 11, n. 52, p. 139. On *Schrottenfels'* plan of an imperial law of negotiable instruments, in 1715, see *loc. cit.*, p. 11.

subject was itself greater than the number of different systems of law in all countries outside of Germany taken together. Doubt had been expressed regarding the possibility of obtaining uniformity even of German laws regarding negotiable papers. How then dared anybody hope to unify all at once nearly a hundred greatly differing systems, such as existed in Europe at the beginning of the century!

§ 8. **Attempts at Uniformity.** — Conditions changed, when the general German Act regarding negotiable instruments was adopted in 1847. Its passage was not merely counted as a national achievement, it also became the starting point of international hopes and aspirations. This it was that confirmed Leone Levi in his belief regarding the feasibility of his own more ambitious proposals related above. If it had been possible to secure a common law for more than thirty sovereign German federal States, some of which were, in general respects, under French, some under Roman, some under Prussian law, why (he asked) should not this precedent be followed by a larger number of governments? In France, Suin (as we saw above) answered that question in the affirmative. At the Ghent meeting of the International Association for the Promotion of Social Science, in 1864, the subject was submitted for discussion.¹ In February, 1867, the English statesman, Goschen,² came out in favor of uniformity in negotiable instruments law, as did also the president of the French Council of State, E. de Parieu, the protagonist of uniformity in coinage.

Parieu was well aware of the difficulties of the task. He enumerated fifteen points of difference between French and German law regarding negotiable instruments; but they appeared to him numerous rather than formidable. He realized fully that the French would have to consent to some modifications of their own law, but he was not afraid of borrowing some rules from foreign law in this branch of commercial law. He did not talk about the “*orbite du droit germanique*.” Although he realized the actual state of affairs, he expressed a hope that “*nous ou nos enfants*” might live to see this great idea an accomplished fact. He even ventured this remarkable practical suggestion, that Germany, France, and England might first come to an agreement on some of the principal points; if that were done, they would constitute “*le triumvirat béni de la civilisation européenne*.”

¹ The deliberation, however, led to no result. Cf. *S. van Nierop*, in an opinion submitted to the Dutch Lawyers' Association.

² “*Journal des Économistes*”, XI, p. 217.

In order to promote his ideas, Parieu put himself in touch with eminent jurists, including the most prominent teacher of commercial law in Germany, Goldschmidt.¹ He also promoted discussion in France, where especially Charles Le Touzé received these proposals with an enthusiasm not entirely equaled by his knowledge of the subject.² About the same time, some zeal in the same direction showed itself in Italy. In that country, Minghetti, a member of the Cabinet, in October, 1869, laid before a convention of Chambers of Commerce the question whether it would not be useful and proper if the government should take the first step towards negotiating with foreign governments regarding the adoption of a uniform negotiable instruments law. The answer was an enthusiastic affirmation. Whether the Italian government ever followed up the resolutions passed by the convention, does not appear. At any rate, all such plans were pushed into the background for a while by that great historical event, the Franco-German war of 1870.

Yet this very year of war, 1870, was destined to become a landmark for all tendencies towards international uniformity of law. We have already described how the war rendered impossible the use of many railway lines, compelled traffic in many cases to take a roundabout way through Switzerland, and caused the numerous complicated law-suits which led to the proposal of the two Swiss barristers. So, too, for negotiable instruments, the war furnished proof, if any were still needed, of the intolerable consequences caused by the diversities of law in the various European countries. The French government felt obliged to defer the day of payment of negotiable papers repeatedly, ostensibly for the purpose of aiding the suffering French industries, but in reality to give ample time to insolvent French debtors. Instead, however, of making an express declaration to that effect, the Act of August 13, 1870, establishing a moratorium, and subsequent decrees, merely extended, repeatedly and for a long period, the time within which protests of bills of exchange might be made. By these regulations, which were intended to produce effects not expressed in the text, a great deal of litigation was occasioned between makers, endorsers, and holders seeking recourse. In the course of such litigation, considerable differences appeared in the views of courts in different countries, not only regarding the interpretation of the moratorium provisions, but also regarding the effect of acts of God or of the

¹ Cf. *Pappenheim*, "Die Uniformirung des Wechselrechts", in "Zeitschrift für Handelsrecht", Vol. 28, p. 512, n. 2.

² *Cohn*, *loc. cit.*, pp. 17, 18.

public enemy ("force majeure") on the duty of presentation and protest. These differences produced intolerable results; *e.g.* a prior holder of an unpaid bill on Paris was, in France and Italy, at the suit of the holder, adjudged liable, while, when this same prior holder tried to obtain recourse against his own prior endorsers in Germany and Switzerland, his action was dismissed.

Such a state of things could not but offend most profoundly the general sense of justice. Almost simultaneously, the first Scandinavian Congress of Advocates, meeting at Copenhagen in August, 1872, and the tenth German Congress, meeting at Frankfort-on-the-Main, declared in favor of eliminating this diversity of law. The last-named body, after thorough discussion in a section meeting, where the feeling was "almost unanimous", adopted, in general session, by an overwhelming majority, and amidst hearty applause, the following resolution: "The adoption of a uniform law of negotiable instruments for all European countries and the United States of America is in accord with modern conditions of legal science and is demanded by the interests of international commerce and credit." The first Hungarian Congress of Advocates, as far back as 1870, had pronounced in favor of uniform principles for all commercial and credit laws throughout Europe.

In the year 1873, the subject was being discussed in England also. The law section of the National Association for the Promotion of Social Science (founded by Lord Brougham in 1856), after prolonged debate, expressed the opinion that precisely in the matter of negotiable instruments it would be not only desirable but also feasible without much difficulty to bring about a mutual assimilation of law between the various countries. In 1880, the Dutch Congress of Advocates likewise expressed similar views.

§ 9. **The Bremen and Antwerp Drafts.** — However significant all these aspirations might be as evidence of a need felt in many countries, and as testimonials for the practicability of the idea of uniformity, they all were deficient in one respect. While declaring that a grievance existed and that it could be relieved, they made not even an attempt at such relief. To supply what was wanting, and to attempt relief by proposing a definite plan, was the task of the three organizations already mentioned in § 4 above.

The Association for Reform and Codification of International Law deserves the first place in this regard. Just as soon as this body had loosened its close relations to the Peace League and substituted for wordy resolutions in favor of impossible ideals serious work for promoting the unification of law, it appointed a committee

to inquire into the principal points of difference between the various types of negotiable instruments law. The members of the committee, with few exceptions, were men distinguished as authors in this field, and represented all the great powers of Europe (except Russia), as well as Scandinavia, Belgium, Holland, and the United States. At three meetings, during the years from 1876 to 1878, held at Bremen, Antwerp, and Frankfort-on-the-Main, twenty-seven principal provisions of an international negotiable instruments law were adopted.¹ These provisions are commonly known as the Bremen Rules. For the most part, they conform to the German and Austrian law;² the principal draftsmen were Borchardt, a German, and Jaques, an Austrian, two men who had already done much good work in this field and shown great activity at the meetings of the German Barristers' Congress. The French remained in the background at the Bremen and Frankfort meetings, probably for political reasons; but fortunately they were a little more strongly represented at Antwerp. Public opinion gave the Bremen Rules a very cordial reception. The German government even undertook to promote them, and entered upon the initial steps with foreign governments.³ The three Scandinavian countries based their new legislation essentially on these rules; Italy, Holland, and Russia also gave them careful consideration in formulating their national codes.⁴ In France, where the existing law was most divergent from the rules adopted, a certain reserve was noticeable. It was said that all the work of the Association "lacked analytical spirit", as well as "the genius for codification which inspires the French jurists."⁵

The Institute of International Law turned its attention to the subject a little later than the Association. At the Turin session, September 12, 1882, it was decided that uniformity in negotiable instruments law was particularly desirable. Thereupon lively differences arose whether to take up merely the so-called conflicts of laws, or the whole subject of negotiable instruments. The latter opinion prevailed. The Institute, however, then went even beyond the Association by drawing up, not merely the leading prin-

¹ Printed in *Pappenheim, loc. cit.*, pp. 537-542.

² The few deviations are shown in *Pappenheim, loc. cit.*, pp. 514, 515.

³ Annual report of the German Branch Association, Bremen, April 27, 1878; *v. Martens*, "Völkerrecht", I, p. 210; *van Raalte*, "Uniform-wisselrecht", in *Pappenheim, loc. cit.*, p. 516, n. 4.

⁴ Cf. *Riesser*, in "Zeitschrift für vergleichende Rechtswissenschaft", VII, pp. 24, 44; my own paper on the draft of a Russian law, *loc. cit.*, IV, pp. 6, 14.

⁵ For details, see *Cohn, loc. cit.*, pp. 46 *et seq.*; also *Pappenheim, loc. cit.*, p. 516, n. 4.

ciples, but a complete code for all civilized States, and not only for foreign but also for domestic bills and notes. The excellent draft was the work of Cesare Norsa, an attorney of Milan, who followed essentially the German law and the Bremen Rules. The draft was adopted, with comparatively slight amendments, at the Brussels session, on September 8 and 9, 1885. Norsa at the same time proposed uniform rules regarding bank checks and similar instruments, but discussion was postponed. The draft of the Institute contained one hundred and six sections, and ten additional provisions regarding the so-called conflict of laws.¹

At the Congress of Antwerp, in 1885, called by the King of the Belgians, a second draft of fifty-seven sections, dealing with negotiable instruments including checks, was submitted, in addition to the draft of the Institute. This new draft was substantially founded on the Belgian law, and claimed to be a model which would appeal to each government by its intrinsic excellence. This expectation, however, seems to have been disappointed, notwithstanding the draft was subsequently amended in several respects. For the Congress itself did not consider its work quite finished, and, as some of the resolutions had to be adopted in a hurry, asked time for further consideration. Moreover, with regard to an important question relating to the so-called "provision"² the Congress, after warm debates, adopted not one but two inconsistent provisions, as alternatives.³ Notwithstanding all this, Speiser, the delegate from Switzerland, was right in declaring, with some reservations, that the Antwerp discussions had much improved the outlook for unification, because the mere fact that representatives of so many countries, not one of which rejected the principle of uniformity, had exchanged views, must have a favorable influence. This is all the more so because many Frenchmen took an active part. How great the enthusiasm for uniformity was at Antwerp is most strikingly evidenced in the statement made by the Belgian minister of justice, Pirmez, who presided

¹ The draft is printed in the "Annuaire de l'Institut", VIII, pp. 97-123; cf. also, *loc. cit.*, II, p. 36; VI, pp. 78, 79, 91; VII, pp. 13, 53-100; VIII, pp. 79-131. Cf. *Riesser, loc. cit.*, pp. 47 *et seq.*

² This requirement of a "provision" (German = "Deckung") imposes upon the drawer the duty to provide the drawee with funds for the payment of the bill. These funds belong, in legal contemplation, to the holder of the instrument, who will be entitled thereto in the event of the drawee's insolvency.

³ Cf. *Speiser*, in "Zeitschrift für Handelsrecht", Vol. 32, pp. 119, 124; *Riesser, loc. cit.*, pp. 29, 30; *Rivier*, in report on the Heidelberg meeting of the Institute, in "Revue de droit intern.", Vol. 19, p. 336; *Thaller*, in his "Annales", Vol. 1, pp. 340, 341; *Cesare Norsa*, in "Rassegna di diritto commerciale", IV, pp. 1-119; *Dove Wilson, ibid.*, pp. 145-161.

over the negotiable instruments section. At the solemn closing session, he said that he should consider the adoption of a uniform negotiable instruments law a piece of good fortune even if the selection was made by lot among any of the recently adopted European codes.¹

§ 10. **Difficulties in the Way of Uniformity.** — The mere history of the movement for uniformity, as here set forth, is sufficient to prove its justification. The extremely few dissenting voices are lost amidst the assenting resolutions of the German, Dutch, Scandinavian, and Hungarian Congresses of Advocates, the similar declarations of national and international associations and conventions, the expressions of eminent and most careful writers in legal and economic science,² and the high authority of the Institute of International Law. Even the dissenting voices do not deny that uniformity would be desirable; they merely doubt its practicability. Why should it be impracticable? It is said that precedent is lacking, that there is no international court to give an authoritative interpretation of an international code, that a negotiable instruments law, like all other statutes, would require amendment from time to time, that the difference of languages, the divergence of law in general, and the national exclusiveness of the various peoples, stand in the way.

Of these objections that relating to difference in language would seem most easily disposed of. Are there not other international conventions? Have not trilingual Switzerland and polyglot Austria federal or imperial statutes? The difficulties arising from the absence of an international court, which might indeed imperil to some extent the permanence of uniformity, should likewise not be rated highly as compared to the value of uniformity itself. Would it not be possible to overcome differences in interpretation, if such should arise, by international agreement? The same simple remedy could also be applied to any needs for amendment, if such should become necessary.

Even the precedent asked for is not lacking. For agreements between various countries regarding matters of private law, we need not go back to classical antiquity, nor to the oriental capitulations, nor to more modern commercial treaties and conventions regarding marriages between foreigners. We need not even point out that stipulations regarding some points in this very field of

¹ Cf. *Lewis*, in "Zeitschrift für Handelsrecht", Vol. 32, p. 93.

² Cf. e.g., *Knies*, "Der Kredit", I, pp. 169, 170; also *Cohn*, *loc. cit.*, p. 30, n. 103, and p. 140.

negotiable instruments law are to be found in the Franco-Turkish treaty of 1740, in that of 1783 between Russia and Turkey, and in the Austro-Persian commercial treaty of 1857. Sufficient to refer to the fact that Sweden, Norway, and Denmark have each adopted an identical negotiable instruments code drawn by previous diplomatic agreements.¹ And if one were to minimize the significance of this by pointing out the close racial affinity of the three Scandinavian countries, we may point to the International Postal Union, which contains at least a few provisions of private law, dealing with the liability of postal departments towards the public and the rights of the sender.² There is also the International Copyright Union, founded on September 9, 1886, which contains a number of private law provisions for all member countries, although each country retains, in general, its own laws and is merely obligated to let citizens of the other member States participate in their protection on an equal footing.³ Then there is also a union for trade-mark protection, composed of seventeen countries, organized June 6, 1884,⁴ and containing similar limitations; and further, the final protocol of the Berne freight law convention, described already, and signed by nine European governments. For the rest, the lack of precedent should never be made a pretext to prevent the progress of legislation.

The diversity of general private laws likewise ought not to be regarded as an obstacle to a uniform negotiable instruments law, provided we keep strictly within the limits of the subject and leave everything outside of that to the regulation of our individual legislatures. It was precisely this prudent restraint that enabled Germany in 1847 to accomplish her unification of negotiable instruments law in such a manner that the new provisions were easily fitted into the diverse systems of general private law of the federal States.

¹ Cf. "Zeitschrift für vergleichende Rechtswissenschaft", IV, pp. 6, 7.

² Unfortunately there is a clause that these provisions shall be of no effect if the local legislation is inconsistent therewith; yet the fact remains that common rules were proposed and in several countries put into effect. It is a pity that the convention relating to the telegraph excludes all liability. On the postal conventions in general, see *v. Bulmerincq, loc. cit.*, pp. 273 *et seq.*; *v. Martens, "Völkerrecht"*, pp. 258, 262; *v. Kirchenheim*, in "Revue de droit international", VII, pp. 455 *et seq.*; XIII, pp. 85 *et seq.*; XIV, p. 616; XVIII, pp. 92 *et seq.* In the place last cited, he also deals with the international law of telephones.

³ *E.g.*, §§ 6, 7, 9, 10; 11, p. 2. On the Union in general, see *Orelli*, in "Revue de droit intern.", XVIII, pp. 33 *et seq.*; "Zeit- und Streitfragen", new ser., nos. 1, 2; *Numa Droz*, in *Clunet's "Journal"*, 1884, pp. 44 *et seq.*; 1885, pp. 55 *et seq.*, 163 *et seq.*; 481 *et seq.*; see the text, on *Clunet's "Journal"*, 1887, pp. 780 *et seq.* and "U. S. Library of Congress, Copyright Office Bulletin."

⁴ *E.g.*, § 8.

§ 11. **Further Obstacles Considered.** — Thus, of all the objections made against uniformity nothing remains but the so-called “ exclusiveness ” of the several nations. This unfortunately does exist as a feeling of national superiority in the field of legislation no less than elsewhere. This feeling produces patriotic qualms at the mere idea of giving up traditional notions of what should be the law, and fears lest thereby the superiority of foreign legislators be admitted. This exclusiveness (“*notre exclusivisme réel ou prétendu*”, as Parieu has it) is found by no means in France only, where, to be sure, the fear of being “ carried away into the orbit of Germanic law ” is rather strongly developed, and where one often hears the conviction asserted that there is a special “*génie de la codification qui inspire les légistes français*”, or a “*suprématie morale, si honorable pour nos législateurs*.” In England and Germany also we sometimes meet with similar views. “*Peccatur intra et extra*.” Thus, in 1873, E. E. Kay, Q. C., seriously advised his countrymen, to draw up, in place of an international code, a purely English one; and this, he asserted, would be so superior to every other that it could be adopted as a whole by the entire world.¹ Again, at Antwerp, as reported by his own compatriot, Sir Thomas Barclay, an Englishman, imagined that he had given the best of reasons for voting in the negative by calling attention to the fact that a proposed clause differed from English law.² Nobody in Germany has gone quite as far as that; yet even there an eminent jurist, in 1872, expressed himself as follows: “ We might just as well wait until the foreigners have become convinced; foreigners will have to come to the conclusion in a number of respects that our negotiable instruments law is the better.”

Quite true; it *is* better in some respects; but where shall the line be drawn? It is better in “ some ” respects, but by no means in all. In “ some ” respects Germany also could well learn from abroad. Did not the German Advocates Congress prefer the English system of recourse after refusal to accept, instead of the German rule? And is not the Belgian and Italian “ private admission ” in many cases to be preferred to the cumbersome and expensive German protest? The German law can also afford to adopt the English type of paper payable to bearer; to abolish the distinction between endorsement before and after maturity (as in France, Scandinavia, and Finland); and to get rid of the ineffective requirement of notice. And so with many other things.

¹ *Cohn, loc. cit.*, p. 36, n. 115.

² *Barclay, in “Law Qu. Rev.”, loc. cit.*

Moreover, are there not in law, as elsewhere, subjects of subordinate importance, which do not depend on national individuality nor are matters of principle, and therefore may be regulated more or less arbitrarily, — as for instance the periods provided by the statute of limitations? If one should defer unification of the law until all other nations had become convinced that our own provisions are better than theirs in matters of such trifling import, that would mean adjournment “ad Kalendas Graecas.” The words spoken by Reuling, at the Fourteenth German Advocates’ Congress, in 1872, express the correct attitude: “The establishment of a common international law regarding negotiable instruments is surely an absolute necessity, to which we ought to be ready to sacrifice much in our own which may be sound in itself. For the great need of uniformity is superior to such matters of detail.” In the same spirit was the reply given at the Antwerp Congress to the Englishman of whom we spoke above: “You Englishmen,” a French delegate called out excitedly, “seem to think it a fine thing if you permit us graciously to adopt your laws as they stand; but we came here to make compromises in the interest of harmony. If we were to make reservations whenever our laws differed, the only result of this Congress would be an agreement on things on which we are already agreed, and we should reserve all those very points for the settlement of which we have assembled here.”

§ 12. **Existing Types of Law.** — What then are these supposed radical differences of detail? Leaving out of account a few isolated systems, we may distinguish on the whole three types of negotiable instruments law: The French, the Anglo-American, and the German.

The Anglo-American type differs from the German in a number of respects, especially by allowing some play to the principle of “reasonableness” in variation as to periods of time and the necessity for certain formalities, where the German law requires strict compliance with the statute.¹ Yet there are many similarities common to the German and the Anglo-American types, as compared with the French law. This is especially true regarding the fundamental nature of a negotiable instrument, whence follow a number of consequences.

The French Commercial Code, together with the numerous codes derived from it in both hemispheres, has remained in a stage of

¹ Cf. *Pappenheim, loc. cit.*, pp. 535 *et seq.* My former opinion to the contrary I have changed (*Cohn, loc. cit.*, p. 38). Cf. also *Riesser, loc. cit.*, p. 26, n. 6.

development, as to the fundamental conception of negotiable paper, which is now several centuries behind the times. It conceives such an instrument as nothing more than evidence of the assignment of a sum of money to be paid by the assignor to the assignee in some other place. Consequently, this Code prohibits the drawing of a bill payable at the place of drawing; requires the statement, in the body of the instrument, of the nature of the consideration paid to the assignor; provides a strict form for further assignments, so that (in particular) the mere writing of the name on the back ("blanco-giro", endorsement in blank) is not sufficient. At one period all this was the law also in England and Germany. British mercantile practice, however, as well as the German negotiable instruments Code, have boldly eliminated what proved so restrictive to commerce; and German legal theory worked out a conception of negotiable instruments, adapted to changed conditions and the requirements of business. When there came to be no more difficulties growing out of the need for transportation of money and the diversity of coins, and when bills of exchange had been transformed from a device for transporting money from place to place into a circulating and credit medium similar to money, there was no further reason for basing negotiability on a contract not contained in the paper itself. The instrument itself became the important thing; the writing, without regard to any prior transaction, determined the character of the paper as regards validity and assignability. Consequently, in Germany and England, bills may be drawn on the place of drawing as well as on other localities; the mere writing of the name on the back serves as assignment; there is no need for a statement of the kind of consideration received by drawer or assignor; simply because he has written his name, a drawer or endorser is liable to every holder in good faith.

The difference in the systems, therefore, is not in reality due to inherent differences of national peculiarities, but merely to the progress of time. A compromise, however, between the conceptions of a by-gone age and of modern times is impossible. Principle is here opposed to principle. In regard to this fundamental matter, therefore, unification cannot be accomplished by mutual concessions, but only by one side giving way altogether. The question is: Which principle shall be abandoned, the older or the more modern one?

Not only intrinsic reasons but many external indications also would seem to forecast the victory of the more modern conception.

The French theory is obviously on the decline. While originally the French law spread widely among the nations of Europe, yet since the adoption of the German negotiable instruments law, more and more nations have abandoned the antiquated principles of the French Code de Commerce. That Code has disappeared from Western Germany as well as from those Austrian Crown Lands which had adopted it. Belgium¹ and Italy, somewhat later, abandoned the French law, from which theirs had been derived, and deliberately joined the German group. Finland, Switzerland, Norway, Sweden, Denmark, and Hungary have modeled their own law upon that of Germany. The new Spanish Commercial Code of 1885 has at least authorized domestic bills and endorsements in blank; though, to be sure, it has adhered only too faithfully to the French system in other respects.² We have already stated that the Bremen Rules and the draft of the Institute follow the German idea. The Congress at Antwerp in 1885 also accepted the most important consequences of the modern theory of negotiable paper.

Still more significant is the fact that in France itself a large number of eminent jurists, including Lyon-Caen, have raised their voices against the narrow and antiquated provisions of the Code de Commerce. There also the opinion is gaining ground which was strikingly expressed by Pappenheim: France is asked to make sacrifices in the interest of France.

However, while Germans and British are jointly opposed to the French in the cardinal question of the nature of negotiable paper, in regard to another important point the French and British are opposed to the Germanic group. This is the question of the so-called "Wechselklausel." By this is meant the insertion of a clause in the instrument itself by which it is designated as a bill or note. This is required by the entire Germanic group (including Hungary, Servia, Finland, Scandinavia, Switzerland, and Italy), as well as by Russia. Other countries, even Belgium, as well as the Antwerp draft, dispense with this requirement. Cannot the German system concede something to the French and English in this regard? This question likewise has nothing to do with national individuality. The clause has been opposed in Germany also, and at the time of the adoption of the Code was the subject of debate. Yet there are strong reasons why Germany cannot

¹ Cf. *Cohn, loc. cit.*, p. 41, n. 127; in the same sense, *Pappenheim, loc. cit.*; *contra, Sachs.*

² *Riesser, loc. cit.*, pp. 27, 28.

abandon her point of view in this matter. The clause is not only a warning for inexperienced persons, a sort of alarm signal for naïve makers of notes; but it is also the only definite characteristic by which bills and notes may be distinguished from other papers such as orders, letters of credit, checks, and the like. These, although similar in appearance, carry with them rights and duties very different from bills of exchange and promissory notes. It would seem that in the interest of the debtor as well as of the creditor, of commerce, of the courts, and of the certainty of the law, the "Wechselklausel" is indispensable.¹

Space does not here permit a discussion of other differences between the three groups. They are of minor importance as compared to those we have mentioned. Even the requirement of a "covering fund"² (which was thrown into the Antwerp Congress like an apple of discord) is not likely to be formidable, if we agree to leave it out of the international code. Just as the Germans, notwithstanding the diversity once so marked in their private law, were able to get along satisfactorily without it, so too this will be possible with an international code containing no such requirement and not even an alternative rule on the subject.³

§ 12a. **The Congresses of 1910 and 1912.**⁴ — The movement for the unification of the law of bills and notes was not taken up again until 1906,⁵ when the Corporation of the Deans of Merchants of Berlin ("Die Aeltesten der Kaufmannschaft") asked Felix Meyer, judge of the Royal Prussian Court of Appeals of Berlin, to make a study of the laws of bills and notes of the world, and to prepare a draft Code. Dr. Meyer acquitted himself of the task in such a masterly manner that his work on Comparative Bills of Exchange Law ("Weltwechselrecht") and his draft Code, published in 1909, became, so to speak, the cornerstones for the unification of the law. Influential in this revived movement was also the International Law Association, which adopted twenty-seven rules for the unification of the law of bills of exchange, at its meeting in Budapest

¹ Cf. *Cohn, loc. cit.*, pp. 57-60.

² For explanation see *ante*, § 9, note.

³ *Charles de Touzé*, in "Journal des Economistes", XI, pp. 207 *et seq.*; *Lyon-Caen*, in *Clunet's "Journal"*, p. 631.

⁴ [This section has been prepared by ERNEST G. LORENZEN, professor of law in Yale University and a member of the Editorial Committee of the present Series. — Ed.]

⁵ [In the meantime the Congress of Commercial Law, held at Brussels in 1888, which concerned itself mainly with maritime law, had approved a draft Code of Commercial Paper, but no governmental action sanctioning this draft had ensued (*Congrès international de droit commercial de Bruxelles*, "Actes", Brussels, 1889; *Clunet's "Journal"*, 1888, XV, 897).]

(1908), modified to some extent at its meeting in Paris (1912); and seven rules for the unification of the law of checks, at its meeting in London (1910).

In furtherance of the same movement, the German government sounded the leading countries of Europe concerning the desirability of holding an international conference at the Hague for the unification of the law of negotiable paper. Finding the sentiment favorable, it asked Italy, which had taken a special interest in the movement, to join it in suggesting to the government of the Netherlands the calling of such a conference. The government of the Netherlands willingly complied with the suggestion, and, in preparation for the Conference, obtained from the governments invited, in answer to a questionnaire which it had sent them, an expression of their attitude concerning the principal questions that would come up for discussion. The Conference met at the Hague in June and July, 1910, and was attended by delegates from thirty-five countries. Aided greatly by the preliminary work of the Netherlands government and by the draft of Dr. Meyer, the Conference succeeded in agreeing upon a preliminary draft of a uniform law relating to bills and notes, which it submitted to the governments represented at the Conference, for examination and criticism.

At a second Conference, held at the Hague in June and July, 1912, in which thirty-nine countries participated, the preliminary draft was modified in various respects, so as to embody, as far as possible, the amendments which had been proposed by many governments. The result was a convention for the unification of the law of bills and notes. At this Conference, also, resolutions were adopted concerning a uniform law of checks, which are to be considered again at a future conference.

At the very beginning of the Conference, it became apparent that whatever progress might be made in the direction of uniformity, it would not embrace the law of Great Britain and of the United States. The delegates from these countries declared that their governments were not in a position to become parties to any international convention concerning bills or notes, and that they would take, therefore, only an unofficial part in the proceedings. The first British delegate, Sir George Buchanan, made the suggestion that the Conference should not attempt to prepare a uniform law, but should content itself with laying down certain principles that might guide the different countries in their legislation upon the subject. The fruitlessness of such an effort had been so clearly

demonstrated, however, by the results obtained from all previous efforts to secure international uniformity, that the Conference decided upon the preparation of a complete code which should become the national law of the contracting powers, without change, except in so far as the convention itself might expressly authorize a departure from its provisions.

The attitude taken by the governments of Great Britain and the United States affected vitally the nature of the rules adopted at the Conference. Although the British delegate, Sir George Buchanan, took a very active part in the deliberations of the Conference, yet the unofficial character of his utterances, in the nature of things, deprived the Anglo-American system of the influence to which it would otherwise have been entitled. The main task of the Conference consisted, therefore, in bringing about an agreement between the French and the German systems. As the French law represented, essentially, an earlier and antiquated point of view in the history of bills and notes (a fact which the French delegates readily conceded), the difficulties in the way of reaching an agreement were much reduced from what they would have been had a compromise between the two leading modern systems, the German and the Anglo-American, become necessary. Such requirements as the "*distantia loci*" and the recital of the nature of the consideration received, were dropped without discussion, and the admissibility of the endorsement in blank was permitted without serious objection.

The German system, as the newer type of law, naturally had a preponderating influence upon the deliberations of the conference. Several provisions of the German Bills of Exchange Law, however, were themselves timeworn and no longer in harmony with the commercial needs of the present day. The German delegates themselves recommended certain modifications of their law, only two of which can be mentioned here.

One of these related to the effect of non-acceptance. In common with the other continental countries, but differing from the Anglo-American system, German law did not recognize dishonor for non-acceptance. Failure to accept on the part of the drawee would entitle the holder of the instrument only to security (the form of which varied in the different countries) that the bill would be paid at maturity. A preference was expressed by the German delegates for the rule of the Anglo-American law, which, in the event of non-acceptance, gives to the holder an immediate right of recourse. This rule was adopted by the Conference.

Another modification suggested by the German delegates related to the duties of the holder of a bill or note. According to German law his duties are absolute, and not merely those of reasonable diligence, the latter being the rule of France, England, and the United States. Personal disabilities, such as the sudden illness of the holder or of the notary, will not extend the time in which presentment or protest must be made, nor will even an act of God operate to extend the time or to excuse presentment and protest altogether. In the Conference, opinions differed widely as to whether the extreme liberality of the Anglo-American law should be adopted. The conclusion finally reached was that a rule half-way between the German and the Anglo-American would best reconcile the conflicting interests of the holder and those of the parties to be charged. By the terms of the convention, a delay or an entire omission to present or to protest a bill or note may be excused by reason of an insurmountable obstacle ("force majeure"), such as war, earthquake, floods and the like, but not by reason of impediments of a personal nature.

In regard to most points on which the laws of the countries participating in the Conference conflicted, concessions were readily made and agreements reached; but in some particulars no agreement was possible. Such was the case, for example, concerning the requirement of the German law that a bill or note must be designated as such ("Wechselklausel"). This requisite found greater favor at the Conference than it ever received before, being approved at this time by several countries belonging to the French group. Owing to the opposition of the French and Belgian delegates, however, who could see in the requirement only a needless, artificial cause for invalidity, no uniformity could be obtained in the matter. A suggestion made by Switzerland was finally incorporated in the convention, which leaves each country free to provide that bills and notes issued within its territory shall be valid without such designation if they are expressly payable "to order."

Nor could an understanding be reached upon the subject of the "provision" or "covering fund." According to French law, there rests upon the drawer a duty to provide the drawee with funds which, in the event of the drawee's insolvency, belong to the holder of the instrument. The difficulty was solved after the manner adopted by the German Bills of Exchange Act, which omits the subject altogether, the conclusion reached being that only the *formal* law of bills of exchange should find a place in an International Code.

A number of other reservations had to be made in favor of the individual powers in order to secure their adherence to the convention. For example, as a concession to Russia, Article 22 was agreed to, which leaves the powers free to accept only the part of the convention relating to bills of exchange, to the exclusion of that relating to notes. The reservations include a great variety of topics, some of which touch the general law applicable to bills and notes as contrasted with the formal law, others relate to the formal law itself, and still others, to the law of procedure and the conflict of laws.

The following are some of the Articles of the convention which differ materially from English and American law :

Articles 1 and 2, which make an undated bill or note void ; — Articles 1 and 10, which consider a bill or note negotiable though not payable “to order” if it be designated in the context as a bill or note ; — Article 15, which protects a holder for value without notice whenever there is a correct chain of endorsements running to him, even if one or more of the endorsements are forged ; — Article 22, which provides that bills payable after sight must be presented for acceptance within six months of their date, which period may be either shortened or lengthened by the drawer but may be shortened only by the endorser ; — Article 25, which allows partial acceptance ; — Article 37, which provides that a bill of exchange may be presented for payment on the day it falls due or on either of the two business days following (Reservation in Article 7) ; — Article 44, which gives four days to the holder within which to notify his endorser or the drawer of the dishonor of the instrument, and two days to each endorser in which to give notice to his predecessor in title ; — Article 53, which provides that the time for presentment or protest may be extended on account of some insurmountable obstacle (such as war, earthquake, floods, etc.), but not by reason of any calamity affecting the holder or person present in the bill (such as illness or sudden death) ; — Articles 70 and 79, which fix certain periods within which action must be brought against a maker, acceptor, drawer, or endorser, varying from three years to six months.

However disappointing the convention of the Hague Conferences concerning bills and notes may be to the ardent advocates of the international unification of the law, by reason of its reservations and the refusal of the English-speaking countries to become parties thereto, it constitutes, nevertheless, a considerable progress over all prior efforts in the direction of unifying the law. It is not

merely a model law, as was that adopted at the Brussels Conference in 1888, which leaves each country free to legislate upon the subject as it pleases. The parties to the convention of the Hague are obligated to accept it as their municipal law, without change except in so far as the convention expressly authorizes a departure. As a result of the Hague Conferences, therefore, the law of bills and notes will be identical, except in matters in which there are reservations, in the territory of the contracting powers.

The work remaining to be done before the unification of the law of negotiable paper is complete, will include the following tasks:

1. *The Unification of the Law of Checks.* — The obstacles in the way of the unification of the law of checks are even greater than those met with in the law of bills and notes. The difficulties arise mainly from the fact that the different countries are not agreed upon what a check is. England and the United States regard it as a species of a bill of exchange which is drawn on a banker and payable on demand. In Continental countries, on the other hand, it has taken a variety of forms. Italy, for example, allows a check to be drawn on any merchant. France goes even beyond this and permits it to be drawn on non-merchants as well. Moreover, the law of checks is of a more recent origin than that of bills and notes, for outside of England and the United States, the check has come into use only in very recent times. In many countries, therefore, the law relating to checks is not firmly established. In consequence of this situation the International Law Association, which considered the subject at its meetings of Budapest (1908) and London (1910) was unable to reach any agreement upon some of the most fundamental questions in the law of checks. All it could do was to recommend a few rules, seven in number, for adoption by all nations. The unification of the law of checks was taken up also at the second Hague Conference; but no attempt was made to prepare a draft for a convention. Thirty-four Articles, however, covering the entire subject, were adopted, which are to furnish the basis for discussion at a future conference. Aided by this preliminary work and by the comments and criticisms which these Articles will call forth, it is hoped that the next conference may find it possible to formulate a uniform law upon the subject.

2. *The Revision of the Hague Convention.* — The delegates at the last Hague Conference were well aware of the fact that their work was not perfect, and that the convention would give rise to doubt and contradictory interpretations. With a view of correcting imperfections and of eliminating such reservations as time and

experience might show to be unnecessary, the convention provides that a new conference shall be called after five years for purposes of revision. It was recognized, however, that the best way to insure a uniform interpretation of the convention was by the creation of an international tribunal with jurisdiction in the matter of bills and notes. The Conference of 1912 expressed, therefore, the wish that the governments represented at the Hague might consider the feasibility of establishing such a tribunal.

3. *Adherence to the Convention by Great Britain and the United States.* — The unification of the law of bills and notes will not be complete, however much the present convention be perfected, until Great Britain together with its colonial possessions and the United States can be persuaded to become parties thereto. This hope cannot be realized, however, in the near future, for the reasons set forth by the British and American delegates at the Conference. The possible advantages to be gained from an international unification of the law are by them regarded as out of all proportion to the sacrifice and inconvenience which the adoption of a uniform law would entail. Quasi-uniformity already exists on the subject of bills and notes in English-speaking countries at this moment; and this would be seriously jeopardized if either Great Britain, its colonial possessions, or the United States should fail to adopt the law of the convention. Moreover, concessions to the continental point of view would have to be made which would change the established Anglo-American law in important respects. A special Act would have to be drawn in England and the United States covering such topics as value, the rights of parties to accommodation paper, and other matters belonging to the general law, inasmuch as the international code deals only with the formal law of bills of exchange. Again, the uniform law would have a form of expression to which the Anglo-American lawyers are not accustomed and which might give rise, therefore, to unforeseen difficulties. In view of the above considerations and the traditional conservatism of Anglo-American law, it will be impossible, for a long time, to create, in those circles upon whose co-operation the adoption of the uniform law will depend, a sufficiently strong sentiment in favor of international unification.

The Hague convention concerning bills and notes will remain, nevertheless, a great landmark in the history of the movement for unification, for it will establish uniformity in the law of bills and notes in all important countries other than those of the English tongue, and thereby reduce the possibility of conflict to those cases

where the rules of the Anglo-American system and those of the convention of the Hague are at variance.¹

§ 13. (IV.) **The Maritime Law of General Average.**—The third field in which the need and practicability of unification of the law became clearly apparent was maritime law. Maritime intercourse (as Lewis aptly puts it) brings together the inhabitants of the most diverse zones and the citizens of the most various countries in even greater measure than commerce on land and makes them share in the same relations. The maritime customs of the island of Rhodes, while the Roman world-empire lasted, and in the Middle Ages, the Consulado del Mar and the Laws of Wisby, were, directly or indirectly, the source of nearly all maritime legal systems of the globe. Are not to-day likewise the various institutions of maritime law common to all nations having maritime trade, no matter how great the diversity of legal detail may be? ² Accordingly, representatives of different nations have raised their voices in favor of uniformity in maritime law through all recent decades. We may mention Alfred de Coureay, the Frenchman; the celebrated American codifier, David Dudley Field; and the expert insurance adjuster of Lübeck, Franck.³ Moreover, the Belgian Ministry have taken up this matter with particular zeal; they even went so far in their rather enthusiastic optimism as to say that the uniform regulation of maritime law was “pour ainsi dire, tout préparé.” However, the discussions at the official Congress of Antwerp in 1885 (often above alluded to) proved that matters had not progressed quite to that point, so far as the whole broad field of maritime law is concerned. At that Congress, sixty-seven questions were submitted for debate; but notwithstanding re-

¹ [For the materials in English on the Conferences of 1910 and 1912, see the following: *Charles A. Conant*, “A Report of the U. S. Delegate to the Hague Conference of 1910” (Senate Doc. No. 768, 61st Cong., 3d Sess.); *Charles A. Conant*, “Report of the U. S. Delegate to the Hague Conference of 1912” (Senate Doc. No. 162, 63d Cong., 1st Sess.); *Francis M. Burdick*, “International Bills of Exchange” (“*Illinois Law Review*”, 1912, VI, 421); *Palumbo*, two articles in “*Diritto Commerciale*”, 1913, vol. XXXII.]

A complete and detailed account of the results of the Hague Conventions compared with American law will be found in Professor *Lorenzen's* article, “The Hague Convention of 1912 relating to Bills of Exchange and Promissory Notes” (“*Illinois Law Review*”, 1916, XI, pp. 137, 225). — ED.]

² *Lewis*, in “*Endemann's Handbuch*”, IV, pp. 5, 6; cf. also *Pardessus*, “*Lois maritimes*”, I, pp. 2, and *Putnam*, in “*Rassegna di diritto commerciale*”, II, pp. 261 *et seq.*

³ Cf. *Siebenhaar's* “*Archiv für deutsches Wechsel- und Handelsrecht*”, V, p. 139; “*Bremen Handelsblatt*”, April 19, 1879 (Nr. 1436); *D. D. Field*, “Draft Outlines of an International Code”, 1872, I, pp. 197 *et seq.*; *Cohn*, *loc. cit.*, p. 23.

sponses had been prepared beforehand, notwithstanding the greatest industry, and in spite of the division of the labors by the creation of a number of sections, yet the difficulties in the way proved so great that on only forty-six points were resolutions adopted at all. As stated in the report of a German delegate, Lewis, it was frequently quite impossible to discuss fundamental principles properly or to balance them against each other, because they differed so much.¹ Accordingly, we are still far from an agreement even of experts, let alone the governments of the various nations, so far as the entire field of maritime law is concerned.

Yet so much has been accomplished that we have now some preliminary papers and important drafts for a number of maritime legal institutions. These subjects are (aside from the so-called conflict of laws)² marine insurance,³ freights,⁴ and general average. We shall speak of the latter only, because on this subject we meet with a novel method of achieving legal uniformity between nations without the intervention of the governments.

The word "average" ("havarie") has nothing to do with the ordinary English word signifying "a mean quantity or ratio"; nor is it derived from either of the German words "Hafen" or "haben," as is sometimes surmised. It is derived, rather, from the Arabic term "awâr", which means defect or injury. Like some other words, such as "mohatra" and "sensal" (broker), it came into the Germanic languages by way of Italy and Spain.⁵ Technically, "havarie" means any damage suffered by ship or cargo. "Havarie grosse", or in English, general average, is an injury done to ship or cargo intentionally, by the master of the vessel, in order to save ship and cargo from a common peril of the sea. The most usual and the original case of general average is the jettisoning of merchandise to lighten the ship. Other kinds are the cutting of the masts, slipping of the anchor, riddance from any other troublesome parts of the ship, ransom from pirates, etc.

¹ Lewis, in "Ztschr. f. Handelsrecht", Vol. 32, pp. 86 *et seq.*, 93. See also Lyon-Caen's reports in *Clunet's "Journal"*, 1885, pp. 595 *et seq.*, and in "Revue de droit intern.", Vol. 19, p. 389; also *Daguins, loc. cit.*, and *Barclay, loc. cit.*

² Cf. Lyon-Caen, in "Annuaire de l'Institut", VII, p. 123; VIII, pp. 124-126; also in *Clunet's "Journal"*, 1883.

³ Cf. *Sacerdoti's* "Thirty-three questions and Report", and Lyon-Caen, "Annuaire", VII, pp. 100-121, VII, pp. 127, 128.

⁴ Cf. Voigt, "Die neuen Unternehmungen zum Zweck der Ausgleichung der in den verschiedenen Seestaaten geltenden Havarie grosse und Seefrachtrechte", Jena, 1882, and the review of Lewis, in "Ztschr. f. Handelsrecht", Vol. 39, pp. 327-330.

⁵ Schröder, in *Endemann's "Handbuch des Handelsrechts"*, IV, p. 260; erroneously, Frank, in "Zeitschr. f. Handelsrecht", Vol. 32, p. 418.

All these and any analogous cases are governed by a legal principle which, following an expression of the Roman jurist Paulus,¹ we may briefly thus define: Sacrificed for all, therefore restored by all. In other words, the damage must not be suffered by that party alone whose property the captain caused to be thrown overboard, but rather be shared in by all who were benefited by the jettison which saved ship and cargo.

This principle holds good also with regard to other things than the carrying of goods.² Ordinarily, a person is not obliged to pay damages, wholly or partly compensatory, to one who suffered loss without the slightest fault on the part of the former. Where, however, there is a community of interest between a number of persons, and a community of risk supervenes, fair dealing³ requires that all the participants in interest should bear the loss which was caused to one of them in order to save all.⁴

At any rate, this fundamental principle in cases of loss at sea has been recognized from remote times. It may or may not be true, as the English lawyer, Jencken, claims, that it was known to the Phœnicians,⁵ or even, as is thought by others, goes back to the Egyptians and Hindus.⁶ It is certainly a fact that this just principle was known to the Greeks, and was received, as part of the "Laws of Rhodes", into Roman legal practice, and thence into the maritime law of the whole world.⁷ All nations recognize this principle where the master sacrifices some goods in order to save ship or cargo; all nations are also agreed that this rule is not confined to cases of jettison proper, but extends to any other intentional injuries and to necessary expenditures.

¹ 1 Dig. 14, 2: "Omnium contributione sarciatur quod pro omnibus datum est."

² According to Dernburg, however, the provisions of the "Lex Rhodia" are not based on a general principle but rather on the special relations growing out of the carriage of freights. — *Windscheid*, "Pandektenrecht", § 403, No. 13, favors extension of the principle in those cases only where one person is the bailee of the goods of several owners.

³ *Jhering*, in "Jahrbuch für Dogmatik", X, p. 350, considers this rule not one of "æquitas" merely, but of strict legal justice. *Voigt*, also, *loc. cit.*, p. 6, thinks that it represents a general principle of law, applicable to ordinary civil relations as well.

⁴ Cf. *Jhering*, *loc. cit.*, and *Hach*, in "Bremer Handelsblatt", No. 1304 (Oct. 7, 1876); also the two authors cited by *Windscheid*, n. 13, *supra*. There is, of course, no claim for contribution in cases where the party whose goods are destroyed by this sacrifice itself obtains full compensation for the loss, for where there is no damage there can be no contribution.

⁵ *Jencken*, "The York and Antwerp Rules with an explanatory introduction." London, 1877. P. 2.

⁶ See *Clark*, in "Law Magazine and Review", 4th series, 162.

⁷ *Kaltenborn*, "Seerecht", II, p. 73. — *Schröder*, in *Endemann's* "Handbuch", IV, p. 261, n. 9, n. 10. — *Wagner*, "Handbuch des Seerechts", p. 56.

§ 14. **International Differences in Detail.** — But this uniformity of law disappears at once and becomes the most confused diversity when one begins to look at the actual details.

What constitutes a “sacrifice”? For instance, where a ship is made to carry an excessive amount of canvas (“a press of sail”) in order to escape some danger,¹ and injury results, will this come within the term? Or is not the ship-owner alone compelled to suffer the loss, in accordance with his contract of carriage? How about the expenditure for munitions for defense, or the damages paid to sailors for wounds received? Again, what is the rule relating to indirect damages or expenditure arising out of the accident? In short, What is the extent of the community of interests?²

In this respect the principle of the English law is diametrically opposed to those of most of the continental States. According to the Continental systems, the community of interests persists even where ship and cargo are, for the time being, separated, on the ground that the master's obligation to carry the cargo to its place of destination still subsists. According to the English rule, the common liability ceases the moment ship or cargo are severally placed in a condition of safety. In the English idea, the important thing is to insure the common safety; in the Continental notion, the common benefit arising out of effective measures taken for the purpose determines liability. The difference becomes of practical importance when a ship has been driven into port by stress of weather. To mention but one consequence: Under the English rule, the wages and board of the crew, while in such a port of refuge, must be borne by the owner of the ship alone; while on the Continental principle these expenditures are part of the general average, and must be borne in common by the owners of ship and cargo.³

While this is the principal doctrine in dispute, it does not exhaust the list of differences by any means. The following questions also receive differing answers: What are the quotas to be

¹ *Schröder, loc. cit.*, p. 265, n. 13; *Lewis*, in “*Ztschr. f. Handelsrecht*”, Vol. 24, p. 510.

² *Ulrichs*, “*Denkschrift betreffend die internationale gesetzliche Regelung des Rechtsverhältnisses der grossen Havarie*”, Berlin, 1878, p. 6. Cf. also the Memorial of the German Branch, Assoc. for Reform and Codification of International Law, to the Imperial Chancellor, Oct. 30, 1877 (supplement to *Hach, loc. cit.*; *Ulrich, loc. cit.*, p. 52).

³ *E.g.*, the German Commercial Code, § 708, par. 4; cf. the table in *Ulrich, loc. cit.*, pp. 14, 15; *Jencken, loc. cit.*, p. 15, ad Rule VIII; *Lewis*, in “*Ztschr. für Handelsrecht*”, Vol. 24, p. 498. On a recent development in English practice, see *Schröder, loc. cit.*, p. 270, n. 8, n. 12; *Franck, loc. cit.*, p. 420.

contributed by the various parties? At what point in time does the value of the goods, either salvaged or lost, become fixed for the purpose of determining the measure of damages? Shall there be a right of lien for the contributive quota? Is liability to affect the parties' entire assets, or to be confined to the property at risk?

It would seem, therefore, that the differences in the laws in force in different countries are sufficiently large. Moreover, the rules must be collated from about thirty maritime codes, written in fourteen languages.¹ Some of the laws are not even statutory. For instance, many of the most important rules in England are nominally based on "the customs of Lloyd's", but according to the opinion of some of the English experts, in reality on the personal idiosyncrasies of the official adjusters.²

§ 15. **The Need for Uniformity.** — Now the question arises, is there a real demand for uniformity? A large number of experts do claim this to be the case; but it must be admitted that some noted experts, zealous though they are for unification, assert that an agreement must first be reached (or at least coincidentally) on uniform laws to govern the freight contract. The three experts referred to are van Peborgh, of Antwerp; T. M. C. Asser, the Dutch Ministerial Councillor and professor, and E. E. Wendt, the naturalized Englishman, in London.³

The influence exerted by the law of freightage on that of general average cannot be denied. Yet the history of the movement for uniform general average regulations shows that it is easier, or at least no harder, to take up a single question by itself. The desire for systematic regularity ought to give way to the wish to get rid as soon as possible of an intolerable condition, even at the risk of "bouleverser toute l'économie de la loi." . . . There is a further reason and to our mind a decisive one why the law of general average should be regulated internationally without waiting for a similar regulation of the law of freights. That is its close relation to marine insurance. The real difficulty, the conflict of laws proper, does not occur until ship and cargo have been insured. Suppose that according to the law of the country where the contract of insurance was made, some particular kind of damage is counted as part of the general average, which under

¹ Cf. *Franck's* letter to Parieu, in "Journal des Economistes", XI, p. 219; also *Franck*, in *Siebenhaar's* "Ztschr. für deutsches Wechsel- und Handelsrecht", V, p. 139.

² *Siebenhaar's* "Zeitschrift", V, p. 117; *Ulrich, loc. cit.*, p. 51.

³ Cf. *Asser* in "Revue de droit international", XII, p. 17; also *Voigt, loc. cit.*

the law of the country of destination does not belong to it. In such a case, it may happen that the insured will get nothing, or (which is just as improper) manages fraudulently to be paid twice.¹ The British adjusters are especially prone to arrogate to themselves the right of changing foreign general average claims in accordance with English notions, thereby causing unmerited and unavoidable losses to the insured.² Now all these troubles might be cured radically by one step, — a step which has in fact been seriously proposed three times, once in 1823 by a Hamburg insurer, Tonnies, again in 1877 by Lloyd's, the great English association of insurers, and once more in 1879, by a German merchant and insurance agent, J. P. Schneider.³ Their remedy is simply this: Abolish altogether the antiquated principle of general average, which has become quite superfluous since the insurance companies have undertaken to serve the same purpose.

Aside from these insurers, however, nobody seems to have expressed himself in favor of this cure by total amputation. On the other hand, lawyers like Kaltenborn,⁴ and more recently Lewis, de Courcy, Molengraaff, and Voigt, have affirmed that there is good reason for maintaining the institution of general average.⁵ As a matter of fact, the principle covers a much wider field than the insurance contract. In itself it affords greater legal protection than any mere agreement. It protects, moreover, the owners of ship and cargo against arbitrary or excessively delayed jettisons, because the master of the ship knows that his vessel will have to bear at least a portion of the loss. Finally, the loss is distributed among a greater number of parties because ordinarily ship and cargo are insured in different companies. Consequently it would seem as if even the insurance companies did retain some interest in the continued existence of general average. While it is true that great abuses have grown out of it, the institution is, nevertheless, capable of reform. And after all, if one were to contemplate only the abuses of legal institutions, there would be (as Alfred de

¹ "Bremer Handelsblatt", Oct. 28, 1860 (Nr. 461); also *Reatz*, in *Endemann's "Handbuch"*, IV, p. 445, n. 11, where the opinions of the adjusters are treated as binding precedents.

² *Hach*, in "Bremer Handelsblatt", Oct. 7, 1876 (Nr. 1304); cf. also *Ulrich*, p. 12.

³ *Joh. Ph. Schneider*, "Seerechtliche Fragen, nebst einer Abhandlung betreffend die überlebte Institution der gemeinen Haverei", Berlin, 1879; cf. *Lewis*, in "Ztschr. für Handelsrecht", Vol. 24, pp. 495, 496; *Voigt*, *loc. cit.*, p. 5.

⁴ See *Kaltenborn*, "Seerecht", II, pp. 74 *et seq.*

⁵ Cf. "Ztschr. f. Handelsrecht", Vol. 24, pp. 328, 521, 524, n. 1; Vol. 28, p. 421; *Voigt*, *loc. cit.*, p. 6 *et seq.*

Courey has pointed out) more reason for abolishing insurance than for abolishing general average.¹

§ 16. **The York Rules.** — If, then, the need for the institution exists and its total abolition is not to be recommended, there remains the slower but surer way, — unification of the law. It was again the British National Association for the Promotion of Social Science which gave the impulse in this direction. Among the purposes of this great association (of which we have spoken above) are the improvement of the laws, and also the promotion of social reforms in the fields of sanitation, education, and economics.² In 1860, the Association issued a judiciously phrased circular inviting the most notable bodies interested in marine affairs to send delegates to the fifth annual meeting at Glasgow. The circular, in which the need for regulating the principle of general average was very clearly set forth, was signed, among others, by the chairmen of the most important shipping, insurance, and mercantile bodies, — certainly an indication that the evils caused by the prevailing diversity of law were very generally felt in England. The chairman of Lloyd's not only was one of the signers, but was the guiding spirit of the movement.³ The invitation was favorably received everywhere, and accordingly representatives of interested circles in England, Belgium, Holland, Denmark, Germany, and the United States met at Glasgow on September 25, 1860.

However, though a number of resolutions were passed at this conference, they were carried by very slender majorities only. One single point was adopted unanimously; viz. a resolution excluding the practice of "press of sail" (mentioned above) from the facts constituting general average. This unanimity has been truly called a victory of ordinary common sense.⁴ The fact that other points found such small majorities proved merely that the subject had not yet been sufficiently prepared by discussion. The officers of the conference were therefore directed to draw up a complete model Act. Accordingly, at the next conference in

¹ Lewis, in "Ztschr. f. Handelsrecht", Vol. 24, p. 524.

² "Bremer Handelsblatt", Oct. 13, 1860 (Nr. 470).

³ Cf. "Bremer Handelsblatt", Oct. 7, 1876 (Nr. 1304).

⁴ "Bremer Handelsblatt", 1860, Nr. 471. — *Contrâ. Franck*, in *Siebenhaar's "Archiv"*, V, p. 131, and "Ztschr. für Handelsrecht", Vol. 28, p. 425; also the author of the article on general average in XVIII, "Law Magazine and Review", 335 (1865). Cf. also "Memorial to the Imperial Chancellor", in *Ulrich, loc. cit.*, p. 55. — On the Glasgow meeting, cf. especially *Franck, loc. cit.*; *Hach*, in "Bremer Handelsblatt", 1876, Nr. 1304, and in *Clunet's "Journal de droit international"*, IV, p. 132; also *Ulrich, loc. cit.*, p. 52.

London an elaborate plan was submitted by them; but that conference appointed a new international committee to draw up a new scheme.

This committee saw fit to carry on its deliberations in writing, and to this fact we owe a number of very interesting papers. Among these, the articles by R. Lowndes, an adjuster and the author of a leading treatise on "General Average", and E. E. Wendt, deserve special mention. The product of the labors of this committee, however, was more than insignificant. Instead of drawing up a complete model Act, as they had been directed, the members were satisfied with stating the principal points of the English law which required amendment, on the ground that the main obstacle to uniformity was found in the customary law of British admiralty practice.¹

A third international Conference was then called at York on September 26, 1864, in order to examine this report. There were present representatives not only of the maritime commercial interests, but also delegates of the Belgian, Russian, Swedish, and Mecklenburg governments. The commercial representative bodies of the German Hanseatic cities had sent as a delegate C. H. H. Franck of Lübeck. Three drafts were laid before this Conference: The recommendations of the above committee referring to English law; a complete draft in the French language, submitted by Engel and Van Peborgh, representing the City of Antwerp; and a third draft offered by Franck of Lübeck. Unfortunately, the Conference voted to take up nothing but the recommendations intended for England, which gave the representatives of Lloyd's their desired opportunity to withdraw from the Conference, and to make their exit with very neat stage effect; though they themselves had begun the movement, it now struck them as highly ominous when resolutions were passed adverse to the authority of their own customs. Accordingly they offered the defense that the Conference had abandoned the original international aims of the movement, and had by its resolutions made the existing legal situation considerably worse.

By this withdrawal the movement was practically defeated. The rump Conference continued to sit as a matter of form, and even recommended that the eleven points adopted, commonly known afterwards as the York Rules, should be taken as the basis of future legislation on the matter of general average by the various governments. Moreover, an urgent recommendation was adopted

¹ *Hach*, "Bremer Handelsblatt", *loc. cit.*

to put these York Rules into practice at once, by inserting them in the various contracts customarily made in the course of marine commerce. After passing these resolutions, however, the Conference declared that its purpose had been accomplished and adjourned sine die, after discharging the international committee.

§ 17. **The York-Antwerp Rules.** — In truth, hardly anything had been achieved by the York Conference. Even its eleven theses were substantially a failure. For instead of establishing a principle they were content with deciding in advance a number of specific cases. Moreover, they were obviously based on a series of compromises, and the various rules were not even consistent with each other.¹

After the fiasco suffered at York, the matter lay in abeyance almost completely for a number of years. It is true that at a subsequent meeting of the Association above mentioned, held in Sheffield during the year 1865, ten rules relating to international freight traffic were adopted; in which, among other things, the rates of contribution to the general average were fixed in accordance with the York Rules.² In 1868 and 1874 also, the adoption of an international, uniform law regulating maritime commerce was discussed at a delegate conference of the North German seaport cities; and a petition was sent to the Imperial Chancellor, suggesting that he take steps towards the adoption of an international code, or at least of portions of the subject such as freight regulations and general average. All this, however, had no immediate effect.

Yet the idea was dormant only. In 1876, it was to awaken to new life and significance. Credit for this revival must be given to the International Association for Reform and Codification of Law of Nations, the same organization (*ante*, § 4) which adopted the twenty-seven rules for negotiable instruments.³ A committee for preliminary discussion of the questions growing out of the law of general average was appointed at the Bremen meeting. The committee held sessions in England and decided to take the eleven York Rules as a basis of discussion, notwithstanding all their defects and inconsistencies. In Germany, where the very comprehensive and consistent general average provisions of the

¹ *Cf. Ulrich, loc. cit.*, p. 53. — "Bremer Handelsblatt", 1861, Nr. 483, attempts unsuccessfully to defend the Rules against the charge of disregarding principle.

² *Franck, loc. cit.*, p. 138; *Voigt, loc. cit.*, p. 13; *Lewis, "Ztschr. f. Handelsrecht"*, Vol. 29, p. 328.

³ *Cf. supra*, p. 367.

Commercial Code had stood the test in every respect, this proposition could not be received without opposition. The German branch of the Association drew up a counter-proposal, amending the York Rules in accordance with Continental views, and supplying deficiencies.

At Antwerp, in 1877, the fifth meeting of the Association was held with large attendance. Here the German ideas on the subject were adopted. On almost all points, the Continental system was victorious over the English;¹ but the motion to adopt the definition of general average in the German Commercial Code was defeated.² The York Rules were amended by changing five of the eleven sections in accordance with the German plan; and on motion of the Bremen delegation another rule, following the German law, was added. The set of rules thus increased was given the name "York-Antwerp Rules" by the Association.

Unquestionably, the York-Antwerp Rules were still defective. They did not exhaust all questions relating to general average, nor even treat all phases of those matters they include. Moreover, they lacked a leading principle, because the definition of general average failed of adoption.³

The further criticism was made that the Rules merely added to existing codes still another which is not fully in accord with any of the bodies of law actually in effect. It was said that it would have been better if one of the existing codes, perhaps the German, or the Swedish, or the French draft of 1869, had been adopted.⁴ But this criticism fails to take into account that in all probability national prejudice would be aroused even more vehemently if instead of making some concessions to the spirit but not to the text of alien laws, the entire law of a particular foreign country were adopted without change. Moreover, the York-Antwerp Rules eliminated profound differences in the law, and solved some very important problems so happily that even in their defective form they were of considerable benefit to the shipping interests.⁵ Alfred de Courcy described the various sections almost without exception as thoroughly practicable;⁶ and even Molengraaff, who raised many objections against details, came to the conclusion that

¹ See memorial to the "Imperial Chancellor", in *Ulrich loc. cit.*, p. 53.

² *Clunet's "Journal de droit international"*, IV, p. 577.

³ Cf. "Ztschr. f. Handelsrecht", Vol. 24, p. 524, n. 1; p. 500; Vol. 28, p. 422; *Voigt, loc. cit.*, p. 4.

⁴ See *Franck* on Molengraaff, in "Ztschr. f. Handelsrecht", Vol. 28, p. 423.

⁵ *Lewis, loc. cit.*, Vol. 24, p. 501.

⁶ "Ztschr. f. Hand.", Vol. 24, p. 524, n. 1.

the tenor of the future international code will be substantially like the York-Antwerp Rules.¹

As for the representatives of Lloyd's, they opposed, at Antwerp, not merely each separate concession to the Continental view, but finally filed another protest against the whole set of resolutions. This time they put forward a reason we have already touched upon, viz. that the whole institution of general average is antiquated and superfluous.

§ 18. **Uniformity by Private Agreement.** — An opposition carried to such an extent caused a great deal of feeling, and led to a coalition of ship-owners, insurers, merchants, and adjusters against Lloyd's. The conservative party represented by Lloyd's was in England opposed by reformers, especially in Manchester, Birmingham, Sheffield, Leeds, and Bradford. These adopted the significant resolution, at a large meeting in London, presided over by Sir Travers Twiss, that the York-Antwerp Rules ought to be put into effect at once, by means of private agreement.

For this purpose, the participants agreed over their signatures, to insert in all their bills of lading and insurance policies, beginning on January 1, 1879, the provision that general average shall in a given case be regulated in accordance with the York-Antwerp Rules.² The number of signers, in Great Britain alone, amounted to 789 by January 1, 1879. The signatures represented 43% of all English shipping. As there were many signers of the agreement in Germany, the United States, and Canada also, and as the insurance companies, too, accepted the clause,³ the York-Antwerp Rules thus came into practical effect.

Opinions differ on the wisdom of commercial interests thus helping themselves and getting rid of the diversity of law without the aid of governments. Of course there is no doubt that they had a perfect right to do so; that is a necessary consequence of the freedom of contract.⁴ Insurers and insured, carriers and shippers, are at liberty to agree among themselves as to who shall bear the loss when damage is suffered. Some will doubt, however, whether such voluntary measures will tend towards unification of the law. It is true that so long as the rules are in effect only by consent,

¹ *Frank, loc. cit.*, p. 427.

² See "Memorial of the Bremen Chamber of Commerce on the practical introduction of the York and Antwerp Rules", Nov. 26, 1878. — The text of the clause criticized and an amendment proposed by *Molengraaff*, in "Ztschr. f. Handelsr.", Vol. 28, p. 429. — See also, *Voigt, loc. cit.*

³ See also the "Supplement to the general insurance clauses", in *Voigt, loc. cit.*, May 19, 1881.

⁴ *Endemann's "Handbuch"*, IV, pp. 8, n. 29, 281, n. 5. *Voigt, loc. cit.*, 7.

nobody can be compelled to insert the clause in the contracts he enters into or the documents he draws. Yet it would seem that the intelligence of the commercial world is underestimated if one assumes that any appreciable number of people, from whim or obstinacy, would refuse to avail themselves of legal uniformity by accepting these reasonable rules. Nor should one overlook the influence exerted by the example of the hundreds and thousands of parties that have bound themselves by their signatures to apply those rules habitually, and who in fact have observed them continuously ever since. Finally, one must consider the force of custom, which in mercantile affairs especially has so often produced actual law.

To be sure, the York-Antwerp Rules have not become binding by international law or treaty; but it is quite conceivable that they may become such in international commerce, as has been the case repeatedly with standard forms of documents.¹ One practical success, however, was not long in following; for the subsequent legislative enactments were found to be in many respects identical with the Rules. This is true of the Belgian law of 1879, the Italian Code of Commerce of 1882, and the Spanish Commercial Code of 1885.²

As a matter of fact, nothing was farther from the minds of promoters of uniformity in general average law than a desire to get along permanently without governmental aid.³ Private action was to be nothing but a provisional remedy; at the same time it served as a means of impressing upon the public the need of thorough redress for this grievance of the commercial world, and of gaining thereby the assistance of governmental authorities. In Germany at least, this was stated as clearly as possible by interested parties in Bremen and Berlin as far back as the year 1879. Petitions were addressed to the Imperial Chancellor and to the Reichstag. In accordance therewith, the Federal Council took the matter up and directed its committee on marine affairs to inquire into the subject, with the assistance of a special board of experts. This board, of which Privy Councillor Roesing was the chairman, reported that in connection with the provisions of the German Commercial Code the York-Antwerp Rules should be entirely acceptable to Germany, excepting one section which ought to be slightly

¹ *Lewis*, in "Ztschr.", Vol. 24, p. 499. Cf. *Goldschmidt*, "Handelsrecht", I, pp. 344 *et seq.*

² *Lyon-Caen*, in *Clunet's "Journal"*, XII, p. 614, 1885.

³ See also *Franck*, *loc. cit.*, p. 422.

amended or rather interpreted.¹ The board expressed its approval, and encouraged the movement to give practical effect to the Rules by means of private contract. It also declared it to be desirable that the German Empire should enter into negotiations with the other maritime countries, with a view to agreeing upon a uniform general average law; and finally the board recommended that the York-Antwerp Rules should be used as a basis of such negotiations, but that there be added five more rules relating to questions arising out of general average.²

[At the Liverpool meeting of 1890, the International Law Association devoted almost the entire session to the Rules. Sieveking, chief justice of the Superior Court of Hanseatic Cities, presided; and the Rules in their present form represent the results of this meeting. The Liverpool deliberations took a broader scope than those of prior meetings; they modified some of the existing rules, and added some new ones. They did not, however, succeed in making a complete code of the subject of general average; nor did they, after the opening discussion, even attempt to do so, — the question being referred to some future session. A debate on the definition of the general principle of average was ushered in by Sir Thomas Barclay's exhaustive presentation of the subject; but the Conference adhered to its traditional attitude to the Rules as essentially practical measures, and refused to grapple with abstractions. Their method in this respect had demonstrated to success, and they would not risk it by pursuing any loftier ambitions.

At several later meetings of the Association, the Rules form the subject of discussion in one or another aspect; and at Antwerp, in 1903, a 19th Rule was proposed and debated. But any change of the now familiar text of the York-Antwerp Rules was regarded as questionable; and so the new Rule, though adopted, was kept separate from the original ones, and was designated the Antwerp Rule of 1903.

Such is the history of the York-Antwerp Rules. But it is by no means a closed chapter. For the authors of that great work have never abandoned their initial aspiration to create a true law of

¹ "In connection with Rule X, the committee would like to see the contribution of the ship's master, relative to repairs, regulated in accordance with the last sentence of § 719 [of the German Commercial Code]; besides, it ought to be made clear that 'port charges' includes not merely the official dues but all expense incurred while in port."

² The resolutions are printed in "*Bremer Handelsblatt*", Nr. 1434, April 5, 1879, p. 127. See also *Lewis*, "*Ztschr. f. Handelsr.*", Vol. 24, p. 523.

nations and to secure the adoption of the Rules by national legislation throughout the world.¹

§ 19. **Conclusion.** — The three fields of railway freight law, negotiable instruments, and general average, are by no means the only parts of the law of international commerce regarding which uniformity is desirable. Suggestions tending in the same direction have also been made with regard to the remaining parts of maritime law, to boards of trade,² to warranties,³ to some forms of trading companies,⁴ to quasi-negotiable papers,⁵ to bankruptcy (which is treated in many codes as part of commercial law),⁶ and to copyright, patent, and trade-mark law; on the last two subjects, promising results have already been obtained.⁷

The simultaneous tendency of so many governments and associations towards eliminating local differences in so many different branches of the law of international intercourse and towards the final attainment of a world law in these matters, proves clearly that a universal need is felt for such unification. It also assures us to some extent of the future attainment of this great goal. To be sure, the edifice of a uniform law of international intercourse can rise but slowly, stone upon stone, in the course of decades and centuries. There may be delays and failures. Yet the goal will be reached, provided discouragement and rashness are alike avoided. The work done at Berne and at Bremen, at York and at Antwerp, justifies the expectation that in the law of international intercourse some day the saying will be verified: "Nec erit alia lex Romae, alia Athenis."⁸

¹ [Quoted from *Bousquet*, "Commentaire pratique des Règles d'York et d'Anvers 1903", Paris, 1906. — Ed.]

² *Schnetzler*, "La nature juridique du jeu des bourses", Lausanne, 1878.

³ *Webster*, "Law Mag. and Rev.", 1873, pp. 1082 *et seq.* — *O. Borchardt*, "Handelsgesetze des Erdballs", I, p. xvii.

⁴ *Borchardt*, *loc. cit.* — *Jencken*, "Annuaire de l'Institut", V, p. 202.

⁵ *Beisert*, "Materialien zur Frage der übereinstimmenden Gesetzgebung der Inhaberpapiere", 1879. — *De Neufoille*, at the Frankfort meeting of the Association for Reform and Codification of International Law, 1878. — Resolutions passed at meeting of same association at Bern, 1880. — *Brunner*, in *Endemann's* "Handbuch", p. 200, n. 24. — *Marcus*, "Zur Frage der internationalen Regelung der Rechtsverhältnisse der Inhaberpapiere", in "Ztschr. f. Handelsrecht", Vol. 26, pp. 16-30, 1886; *Clunet*, *loc. cit.*, VI, p. 222; "Annuaire de l'Institut", III, p. 406; V, p. 202.

⁶ Second Italian Lawyers' Congress, Turin, 1880. Paper read by the Russian State Councillor *v. Tuhr*. Cf. *Martens*, "Völkerrecht", II, p. 356. *Clunet*, *loc. cit.*, VII, p. 625; "Annuaire", V, p. 201.

⁷ On the history and literature of the movement, see *suprà*, and "Rassegna", I, pp. 545, 546.

⁸ To be sure, Cicero meant this in quite a different sense. Cf. *Borchardt*, *loc. cit.*, p. xiii, n. 1. — Also *Krueger*, "Geschichte der Quellen und Literatur des Römischen Rechts", p. 41, n. 10.

CHAPTER XI

THE PROGRESS OF THE UNIFICATION OF MARITIME
LAWBY GEORGES RIPERT¹

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| § 1. Distinctive and Original Character of Maritime Law. | § 4. History of Unification of Maritime Law. |
| § 2. Traditionalism and Evolution. | § 5. Methods of Unification. |
| § 3. Present Tendencies of Maritime Interests. | § 6. Modern Attempts at Unification. |

§ 1. **Distinctive and Original Character of Maritime Law.** — Maritime law can not, without grave misunderstanding, be viewed as an application of the law of commerce by land, to the instrumentalities and personnel of maritime trade. It is a principal and not a subordinate law. To explain this feature, we need only recall the economic conditions under which this branch of the law developed.

For a long while there was no tie which related commerce by sea to commerce by land. In antiquity and the Middle Ages the cities carrying on a trade by sea, sought to isolate themselves so far as possible, in order to make their defense easier.² They were centers of movable wealth. At a time when such riches were rare, the chief objects of maritime trade were gold, rich fabrics, precious metals, spices, and purple. The merchant marine had no relation then to the productive forces of the country to which it belonged.³ There is nothing surprising in the fact that maritime

¹ [Professor of Comparative Civil Law in the University of Aix-Marseilles.

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Other works of this author include: "*Essai sur la vente commerciale*", (1875). — Ed.]

² *De Rousiers*, "*Les forces productrices de la France*", p. 93.

³ The commerce of the Hanseatic Cities may be cited as the most striking example of such a type: "Until the last century", says *de Rousiers* (*ibid.*, p. 53), "traces remained of this spirit; in 1840 the city of Hamburg still appeared much interested in separating its port from the surrounding territory and in avoiding every sort of relation with the country behind it; an attitude which astonishes us to-day when we realize the close and powerful ties at present relating Hamburg to the surrounding country."

commerce was governed by rules which owed almost nothing to the common law of the different nations.

Roman Law.—While, then, the jurists of early law found in the Digest and Code of Justinian a few provisions relating to maritime law, it was not Roman law which was to govern commercial navigation. That that law had certain influence is possible; but its influence was, we believe, indirect. And moreover, the compilations of maritime usages are found written in the vulgar tongue at a time when all the learned classes were employing Latin. Nor was the written general custom of the land referred to in maritime affairs. It voluntarily avoided the whole field of maritime contracts, and no effort was made to fill out the deficiencies of local usage by appeal to the common law.

The *French Marine Ordinance of 1681* did not weaken this individuality. It may be said to have even accentuated it, since it united in a single body all the provisions of the criminal, private, procedural, and public law, relating to maritime subjects. Valin and Emerigon wrote commentaries upon the Ordinance, citing the early texts, the usages which were still preserved, and foreign customs. Pothier, the greatest jurist of the 1700s, showed himself obviously inferior to these authors, when he undertook to explain maritime law.

So this body of law was preserved, in all its originality, without foreign contribution or corruption, possessing its own commentators, judges, and public. It was to survive the French Revolution without shipwreck. Institutions, which, to the superficial and theoretical mind of the period, seemed contrary to the principle of equality and the free right to labor, as for instance marine registration and the “*corporation des prud’hommes pêcheurs*”, were not molested. However, the courts of admiralty succumbed, and their abolition was a severe blow to the distinctive character of maritime law.

The French Commercial Code.—It might have been feared that the codification of the early 1800s would destroy the originality of maritime law. For the first time this law found a place within the general body of private law. But the jurists who undertook the codification, knowing little of the rules of maritime trade, paused respectfully before the work of Louis XIV, which had so long been held up to general admiration. The Commercial Code reproduced the Ordinance almost textually.

This Code is still in force, and maritime law has consequently preserved institutions which are absolutely peculiar to it. To cite

a few merely at random: registration in the transfer of ownership of vessels; contracts of seamen and the protection of their wages; creditors' right to proceed "in rem"; the number and rights of lien creditors; coöwnership of vessels; rules governing the contract of affreightment and the payment of freight; limited liability of the ship-owner; the rule in case of doubtful responsibility for a collision; general average; abandonment in the law of marine insurance.

Weakening of its Distinctive Character. — The 1800s saw a constant moderation of the distinctive character of maritime law. This was due at once to juridical and to economic considerations. First there was codification. I have said that the drafters of the Second Book of the French Commercial Code followed the "Ordinance" very closely. It was none the less true that, from then onwards, maritime law was presented as a part of commercial law. It was severed from all rules not affecting the relations of pure private law, and, thus mutilated, it became difficult to interpret.

Moreover, who was to interpret it? The same authors who undertook to expound the Commercial Code as a whole. And naturally these early commentators brought to their task their own methods of reasoning and their knowledge of the Roman law or of civil legislation. Thus, unwittingly, they tortured maritime law and deformed its most original institutions, in order to find in them instances for the application of Roman law.

There was another and yet graver influence. The Revolution destroyed the courts of admiralty which had had jurisdiction over maritime causes. The determination of these affairs was confided to the commercial courts. In the important ports the maritime element is represented upon these courts; elsewhere it is the small trader who sits in judgment.¹ Moreover, though the commercial court is a special jurisdiction, it only sits in first instance, and on appeal we come again within the ordinary jurisdiction: that is, the Courts of Appeal and the Court of Cassation. Judges without special knowledge of maritime law will naturally tend, in interpreting it, to use methods peculiar to the apparatus of the common law.

Lastly, codification destroyed or diminished the value of custom or usage. All the rules of the law are sought in the statutes: when these are incomplete, recourse to the legislature becomes necessary. When the legislature enacts a general rule it applies it to maritime

¹ [In France the judges of the commercial courts are not chosen from the legal profession, or even those having a legal education, but from an electoral list of registered merchants; cf. Law of Dec. 8, 1883, Art. 8. — TRANSL.]

matters, and we find, for example, the French Law of February 19, 1889, applied without preliminary discussion to marine insurance, when it was intended, in principle, to regulate fire insurance.

The Economic Factor. — Economic causes aided in the work of unification, brought about by the weakening of the law's individuality. The shipping industry has changed in character; it is no longer the concern of a few cities and of certain classes: the entire nation is interested.

The merchant marine is no longer independent of commerce by land but is inseparably related to all the national resources. All countries may aspire to possess a merchant marine if their national prosperity is great. Geographical situation has become a factor of minor importance in determining preëminence at sea; the economic situation is the preponderant factor. A port cannot survive unless it is bound by arteries both by land and river to the territory lying back of it; the whole commercial movement of the country and of the bordering nations, must flow uninterruptedly towards the port. The products, taken at their place of origin, mine, foundry, and factory, are forwarded toward their destination by the most divers modes; they go forth in search of markets ever more distant. No country dares ignore the foreign peoples reached by marine transportation. The whole nation is interested in the prosperity of the merchant marine.¹

Influence of Civil Law on Maritime Law. — The result of all these influences is extremely curious. On the one hand maritime law is absorbing rules of the common law, and on the other hand its influence is penetrating the civil law, through a generalization of the institutions of maritime law or a development of the ideas which originated them.

For example, maritime law for a long while utilized an instrument of credit wholly original to it; the bottomry bond. To-day this no longer has any importance; an original institution has been lost. It has been partially replaced by the marine mortgage, an illustration of the penetration of maritime law by the civil law; or, again, by a loan made upon the cargo, which is also a practice of trade by land. So, too, the old coöwnership of vessels is disappearing, and the marine company is taking its place, borrowed from the institutions of land commerce. As new marine contracts make their appearance (towage and carriage of passengers), the

¹ *Marcel Dubois*, "La crise maritime" (1911), has demonstrated very admirably the place which maritime trade must hold to-day in the life of the nation, and the present opportunities of all countries in maritime life, regardless of their geographic location.

rules of the common law of contracts are applied to them. And finally, as has already been said, industrial legislation is invading maritime law, — decreeing, for example, a weekly day of rest, or a maximum period of work, because such rules exist in other activities.

Influence of Maritime Law on Civil Law. — On the other hand institutions, formerly peculiar to maritime law, have passed over into the common law. Under the pressure of practical necessity, maritime law had created rules of its own, the more easily accepted in that there was little interest in reconciling them with the common law. To-day the field of these distinctive institutions has singularly increased. Thus, formerly, marine insurance was the only form of insurance known: to-day all or nearly all risks may be insured. So also, the obligation, imposed upon the shipowner of caring for seamen, sick or wounded in the service of the ship, was the first appearance of the idea of industrial risk, which has now passed into civil legislation and assures indemnity for accidents incident to work. Another example is the exemption of the wages of seamen from attachment. This no longer presents anything exceptional. Again, obligatory insurance against infirmities has become the rule common to all workmen.

Perhaps this penetration of common law by maritime law is not yet at an end. Some day it will be seen that the transfer by registration is more perfect than the transcription of the land record, or that the conception of a separation of the estate embarked in commerce may give good results for all classes of traders.

We must add that when a movement has commenced, it carries within itself an energy which hastens its progress. It is the need of uniformity, the tendency of our mind to force all institutions within old categories, the desire to have a fine juridical organism. A nation of logicians, like France, naturally loves this regression of the commercial law.¹

Revival of Individuality. — Lately, however, there has taken place a revival of the individuality of maritime law, under the influence of a very well defined cause. As maritime law merges into the general common law, wider variances are betrayed in this branch of legislation of the different countries. If we are to arrive at an international legislation, we must begin by rooting maritime

¹ Cf. *Thaller*, "De l'attraction exercée par le Code civil et par ses méthodes sur le droit commercial" ("Livre du centenaire du Code civil", Vol. I, p. 226). Compare *Lyon-Caen*, "De l'influence du droit commercial sur le droit civil depuis 1804" (*ibid.*, Vol. I, p. 207); *Laurent*, "La fusion du droit civil et du droit commercial" (thesis, University of Paris, 1903).

law from the soil in which it has been planted and set it upon the plane of an independent branch of knowledge. In the conferences called to draft such legislation, frequent stress was laid upon the absolute necessity of rejecting all the legal conceptions imposed by the Roman law or derived from private law in general, so as to adopt solutions justified by maritime practice.

Already two countries, Belgium and Greece, conforming with the aims of these Congresses, have introduced into their positive law rules which owe nothing to the common law, which have been fashioned wholly in view of the benefit to the interests involved, and as a basis for a future international understanding. Our own legislation has not yet bent to this influence. But it may be foreseen that it will not escape. Already the French delegates have accepted principles which are in complete conflict with principles of our civil law, such, for example, as the recognition of a lien in favor of the victims of a collision. Moreover, in order to mark their originality, they have plainly emphasized (at times over-emphasized) rules peculiar to maritime law, such as the limitation of the liability of the owner to the amount embarked in the particular marine venture.

This reawakening of individuality presents some dangers, for it is artificial. Certainly we should not, through neglecting the purposes of maritime law, incorporate in it all the rules of the common law. But it would also be dangerous to sever it too suddenly from the general body of our law. Its originality must be maintained with great discrimination. It is preferable that the common law adapt itself to it by taking account of the differences of conditions, rather than create arbitrarily, by the resolution of a conference, rules which have never been tested, whose originality is not without danger, and whose indirect effect can not be calculated.¹

§ 2. **Traditionalism and Evolution.**—The remarkable stability of maritime law has often been praised. Pardessus, describing the evolution of this law through the ages in all nations, declared: "Independent of the changes which the centuries bring, or of the revolutions and barriers produced by national rivalries, this law, unchanging amid the disruptions of society, has come down to us

¹ Cf. Gütschow, "Die Reform und Vereinheitlichung des Seerecht durch Rückkehr zum allgemeinen Frachtrecht" (Hamburg, 1911). This author also criticizes the unification of maritime law through mutual concessions; but above all he attacks the revival of originality in maritime law, which, he believes, has no longer any reason to exist separately; he demands a single law for transport by land and by sea.

after thirty centuries, just as it was, when, in the first days of navigation, it established relations between peoples.”¹ And recently Danjon has written: “It has traversed the ages without growing old.”²

Nothing could be more inexact. Fortunate for us that our maritime law does not date thirty centuries back! There has been a confusion here between the stability and the individuality of the law. It is true that the ordinary forces of legal evolution do not touch maritime law. It is not concerned with moral or religious questions or of varying political systems. Ideas and habits may change without its being affected. It lives a life apart: it has an aspect peculiar to it.

But on the other hand economic changes affect it very profoundly. If the conditions of commercial navigation are revolutionized, so is maritime law also. And it has been revolutionized in the deepest sense.

The truth is that the change has been very recent. “Since the day,” says Ambroise Colin, “when some unknown and inventive mariner discovered the art of making a sailing ship advance against the wind, up to the last of the 1700s, nautical art made enormous progress, but it did not accomplish a revolution. . . . If we imagine a companion of Nearehus or of Vasco da Gama, magically awakened from his sleep of centuries, and transported aboard a ship of the period of the Restoration, certainly his admiration would be boundless at the progress of nautical art, but his eyes would see nothing which was absolutely incomprehensible to him.”³ Thus for some centuries commercial navigation followed the wandering guidance of the past. Ships grew in size; voyages were lengthened; but, after all, these were gentle enough changes. Is it surprising that, along its broad lines, the maritime law of the 1700s resembled that of the 1300s and 1400s?

Recent Transformations. — To-day the transformation is complete. Even before the use of steam, ships had reached large dimensions. The application of a new method of propulsion, and steel construction, still more increased the vessel dimensions. The demand for speed and the luxury of appointments required enormous capital. The change in the materials brought about the revolution in the manner of employment. This new property belongs to a few great companies which have replaced the ship-owners of

¹ *Pardessus*, “Collection des lois maritimes”, Vol. I, p. 2.

² *Danjon*, “Droit maritime”, Vol. I, no. 10, p. 22.

³ *A. Colin*, “La navigation commerciale au XIX^e siècle”, pp. 31, 32.

old, who one after another have succumbed. These new vessels carry a very numerous personnel, who are not exclusively occupied with the navigation of the ship. Alongside of the nautical crew are others who perform a general service and constitute a civil crew. These receive a status. The number of officers has increased. The functions of the captain have changed. At each port of call the owner maintains an agent or a correspondent charged with the care of his commercial operations. Powerful steamers transport at great speed a very varied cargo, belonging to a considerable number of consignees.

The economic conditions of transportation have been wholly changed, and we find the rules of law changing with them. Thus we have the delivery of the cargo by the owner's agent to the freighter's agent at the port of destination; payment of freight unconditionally; clauses of non-liability of the transporter; sales of the cargo while on voyage. All this is new law. The new navigation does not run the same risks as the old. It no longer fears piracy, and still less tempests; but collision has become much more frequent and dangerous, and hence the change in the rules governing collision: the establishment of the principle of obligatory salvage. If navigation is safer, it is also more rapid; for commercial operations must be accomplished with the desired speed. Negotiable bills of lading, insurance for the account of a third person, "floating" policies, — these are the means discovered by modern practice to safeguard interests. We have not the time to discuss them at length here.

These few remarks suffice to make clear the profound transformation of maritime law. Nothing now resembles less the undertakings of early days than the modern employment of a ship; nothing so differs from the old affreightment than our modern contract of carriage of merchandise. And other institutions, such as credit and insurance, have also undergone a radical evolution. All have had to adapt themselves to the modern conditions of navigation.

Traditionalistic Spirit. — Of the alleged stability of maritime law, one feature, however, remains true which should be perpetuated, and that is the traditionalistic spirit of this law, due certainly to its individuality. Just as once Roman civil law, so to-day maritime law, does not willingly surrender its early institutions, even when these have lost their justification. It possesses some curious survivals. For example, the change in the mode of employment of the ship and the creation of great companies still

leave us the coöwnership of vessels, — an antiquated form of enterprise in common, to-day without utility. The creation of the marine mortgage, a new form of credit, has left surviving the bottomry bond, which no longer exists except in the literature of the law. So, also, while the old principle of association of interests between master and shipper weakens, the theory of general average is retained and applied still to-day, though insurance has robbed it of the greater part of its practical interest.¹

This partial retention of old institutions which must be combined with the new rules gives a complexity to maritime law, not without inconvenience. There are rules to-day which are badly out of alignment. And yet this traditionalism possesses the advantage of avoiding an unfortunate leap towards excessively brusque reforms.

§ 3. **Present Tendencies of Maritime Interests.** — The present trend of maritime law may be summed up in two principal aims: to assure rapidity and to gain security for maritime transportation. Transportation by sea brings together numerous parties in interest, but the terms of each contract are not discussed singly by them. The rules are almost always fixed once for all parties and for all classes of transportation. They have been discussed by representatives of those interested, who are all in close association. The great shipping companies unite through mutual agreements and trusts, or simply intrust a central committee of owners with the defense of their interests. Ship-owners are to-day powerful companies who debate their interests in conferences and form permanent committees. By the nature of things the freighters remain more isolated; yet they too have found a means of coming together in conferences, and, moreover, their assurers undertake, for their account, to protect their interests.

All these forces do not act with the same aim. But all have the same interest, when it is a question of affording greater security and rapidity to commercial operations. These are the requisites of marine trade to-day. It is not surprising that maritime law has made every effort to give satisfaction to these needs.²

¹ Upon the survival in maritime law of conceptions from the primitive penal law and especially of private punishment, see *Huguency*, "L'idée de peine privée dans le droit contemporain", in "Revue critique" (1906), p. 419. He cites especially as survivals of this idea, Articles 297, 292, 240, 357 of the Commercial Code, and Articles 52 and 69 of the Law of April 15, 1898, relating to the confiscation of the wages of deserters [which modifies the Decree-law of Mar. 24, 1852. — TRANSL.]

² [The succeeding §§ 56-60 of the author's chapter may be thus conveniently summarized:

Reconciliation of Security and Speed. — On first examination, these two aims, security and speed, seem contradictory, and in this there is a certain amount of truth. To be able to proceed in perfect safety, it must be possible to calculate the risks at leisure.

Nothing is more interesting than the manner in which maritime law has reached a reconciliation of these two opposing needs of commercial navigation. The ship makes as frequent voyages as possible; even its destination is not always known at the moment of departure. Consequently the "time" policy has given way to the "voyage" policy, and it is now contemplated to replace abandonment in specie, which is rigid, by a declaration in money value of the interest embarked. The merchandise is loaded without previous verification; special clauses of the bill of lading provide a mode of calculating the freight and of fixing the liability of the

Security. Maritime law early secured the ship-owner against the dangers attending his occupation by a division and displacement of the risks. In the division of risk, ship, merchandise, and capital were contributed by different persons; the ship belonged to co-owners, among whom the crew might figure; vessels, bound to the same port, traveled together, to unite against dangers. The unity of interest of owner and freighter found expression in the doctrine of general average; the owner could rid himself of liability for the captain's acts by abandoning ship and freight. The risk was displaced by the bottomry bond and marine insurance, which transferred it to another through an aleatory contract upon consideration of an immediate sacrifice.

To-day the ship-owner has approximated entire security. Preventive measures due to scientific progress have greatly reduced most dangers except collision. This growing peril is being reduced by regulating courses and by obligatory salvage. A second means of security is a development of the division of risk by the introduction of the stock company as owner. The third means is the limitation of liability. The owner's liability to third persons is restricted to the ship and freight, and he is liberated by abandonment; toward the freighter he secures immunity by a clause in the bill of lading; his obligations to the seamen are covered by obligatory insurance. Meanwhile the doctrine of general average survives.

Different from the early displacement of risk, modern marine insurance covers the full value of both ship and cargo. The insurer survives a crisis because of the number and variety of risks, the vast capital employed, and the practice of reinsurance. Bottomry and general average have grown less important.

Rapidity. The vast capital invested requires intensive employment and rapidity of operation. To meet this demand, maritime law early minimized the possibility of conflict by requiring contracts to be in writing, exacting rigorous conditions of recovery at law, adopting short periods of prescription, introducing derogations of the law of agency, liquidating damages for breach of the contracts with seamen, of affreightment or insurance. Practice has been somewhat modernized.

To the same end the marine broker has been substituted by the owner's, the freighter's, and the insurer's agents, stationed at the port of destination and enjoying new powers. The charter-party is no longer written; the bill of lading is not drawn in duplicates and need not be signed by all parties; the shipping-agent undertakes to transport by varied means. The negotiable bill of lading permits the sale or pledge of the cargo in route; while the cargo procures the needed credit to the consignor or consignee. — TRANSL.]

carrier. There is no time to insure the goods specifically; but this is of no consequence, for the goods travel subject to the terms of a "floating" policy, which covers at once all the merchandise which can be loaded.

So marine operations have taken on a special character which may be termed automatic. The spirit of adventure is no longer necessary to try one's fortune at sea. On the contrary, what is needed is a mathematical mind. There has been an industrialization of marine commerce, and the law has naturally bent to meet this evolution. It has furnished navigation with the means of realizing it. It has made possible the calculation and insurance of risks amid an astounding rapidity of complex operations.

§ 4. **History of Unification of Maritime Law.**—The exact calculation of risks and liabilities encounters a serious obstacle in the diversities of legislation. It is impossible to know in advance what law will govern the difficulties arising out of marine operations. The owner, the shipper, the insurer, are exposed, through the risks of navigation, to foreign law. We have explained how such conflicts, which were formerly relatively rare, are becoming to-day, and will become in the future, more and more frequent; how the number of conflicting laws tends to increase; and why it has not been possible to propose the adoption of a uniform rule (the law of the flag or other law) to provide a solution which could be anticipated. Even could we fix by agreement the law to be applied, the result sought would not be obtained, because all the interested parties could not in advance come to a determination of the law applicable. The evil appears the greater as the desire for security becomes more pressing; and it has been thought that the situation might be remedied by an international unification of maritime law.

Early Uniformity.—It has often been remarked that this unification would be a return to the early practice of the Middle Ages. There did, indeed, exist formerly a certain uniformity of maritime usage. The navigators of every country, escaping as they did the wretched treatment accorded foreigners on land, and accustomed to voyage in company, could not subject themselves successively to all the laws of the ports which they frequented. Usages grew up (the sole source of law) which commanded respect in all the neighboring countries. There was a "lex maris", a "bonne coutume de la mer."

The usages laid down in the "Consolato del Mare" were followed in Provence and Spain and in the Italian cities. Provençal

and Catalan were brothers in race and language; the decisions of the Consuls of Barcelona were cited at Marseilles. The usages contained in the Laws of Oleron applied in the Bay of Biscay, the English Channel, the North Sea. A manuscript of the Laws of Oleron relates that the rules were observed at Bordeaux, in England, Brittany, Normandy, Scotland, and Prussia. They were even applied in Spain (for we possess a manuscript in Castilian) and in the Scandinavian countries (whose compilations of usages were copies).

Thus, in spite of the diversity of customs, the multiplicity of independent cities and states and the hardships of the law toward foreigners, maritime law was born and developed.

Forces against Uniformity. — Uniformity received its first blow from the development of the municipal statutes. The day when local authority or a corporate body was strong enough to impose its rules, it rendered subject to them only its citizens or members, and diversity made its appearance. Thus, beginning in the 1300s, the Hanseatic League substituted for common usages its enactments ("recessi"), at first very brief, but later more and more complete; it imposed its own regulations on all its members and established courts which applied only its laws. The restricted community which it found among a few cities substituted a gild law for the common law of the sea.

There was even greater reason why common maritime usage should have been thrust back by the national legislation. The day when Charles V or Philip II adopted ordinances to govern marine matters, various considerations came into play, giving to such rules a national character and preventing their imitation or multiplication. Uniformity within the kingdom was obtained at the expense of general uniformity. In France the Marine Ordinance of 1681 procured the great benefit of fixing for the whole kingdom the maritime usages followed until that time; but it necessarily imparted to international custom a national character.

In spite, however, of national legislation, maritime law preserved a certain uniformity up to the 1600s and 1700s. The reason was that at first the national ordinances were often no more than compilations of ancient usages, common to several peoples. The Ordinance of 1681 very clearly presents this character. We must also consider the international influence which the Ordinance of 1681 exerted. Its legislative value and the supremacy of France under Louis XIV caused its adoption as the common law of maritime Europe. And, lastly, the force of tradition and the influence

of jurists contributed to preserve unity. Interpreters of the Marine Ordinance continued to cite the early maritime usages and the rules observed abroad.

Codification. — But codification was destined to cause the definite disappearance of uniformity. While defended in the name of legislative unity, it was to produce in maritime law the curious result of causing diversity.

This movement was very marked in the 1800s. In the first half of the century, the French Code, modeled on the Marine Ordinance of 1681, was adopted in a great number of countries whose usages it translated; or else it was imposed by imperial conquest. But Great Britain already had a different law. In 1861 Germany drafted its Commercial Code and escaped from Latin influence; in 1897 it revised this Code and drew still further away from French law. In the last twenty years Italy and Spain have revised their Codes, giving them a national stamp and borrowing in part from the German legislation. These revisions carried along with them the countries under Italian and Spanish influence. Then new countries were born to maritime history; the United States and Japan. They have their own legislation, often constructed from various borrowed sources. And in the first years of the 1900s Belgium and Greece reformed their antiquated codes upon new principles.

Unjustifiability of Diversity. — Thus codification has caused diversity. And yet this diversity has no very good justification in maritime law. Variances in national civil legislation are explained and justified by the fact that such legislation reflects the religion, customs, traditions, political system, and the economic situation of a country. Nothing of this sort is true in maritime law. This law governs property which is everywhere similar, and of like value, and, moreover, constantly being moved from place to place; men, who are everywhere engaged in carrying on the same occupations in an identical way, and in a certain sense separated off from the rest of humanity; contracts which answer like needs, are executed in the same manner, bring into action persons from every country; and finally, risks, which arise for everyone with the same frequency and demand similar indemnity.

“Uniformity,” wrote Pardessus a long time ago, “is of the essence of maritime law. While civil laws are closely bound to the nature of the government, customs, and habits of the country, the same is not true of the laws of marine commerce. These laws, growing everywhere out of similar needs, receive from this very

circumstance a character of universality which makes it possible to apply to them what Cicero so well said of natural law: 'non opinione sed natura, jus constitutum.' And as they interest the whole world, over which navigators form, so to speak, a single family, their spirit can not change with the boundaries of nations. The worst civil code would be one destined for all nations without distinction; the worst maritime code would be one dictated by special interests or the particular influence of the customs of a single people."¹ More recently, Beirnaert said, in opening the Liverpool Conference: "The ocean must know but one and the same law throughout all its latitudes."²

Diversity of Economic Interest. — There was a certain exaggeration in this, which was clearly felt. In effect, in this desire for uniformity, we forget to take into account one factor, the economic interest of a country. The interest which this influence exercises on civil law is recognized; how much greater then is it upon maritime law since it is the only one controlling? It is pure theory to affirm that all peoples have the same interest, and should, therefore, have the same laws. Their situation is too profoundly different for them to accept similar rules. Marine commerce, I have already said, is an effective means of domination in international competition. The tariff régime, enforced to-day by all nations, can with difficulty be reconciled with international uniformity of law.

This diversity of interests has been so emphatically manifested in the international conferences that it may be asked if it will not exclude all mutual agreement.³ But such a conclusion would be over-pessimistic. There are a certain number of questions upon which agreement is possible. Wherever legislation differs merely upon purely legal principles, unity will be possible. But wherever opposed interests are evident, it will be difficult to disarm them.

§ 5. **Methods of Unification.** — The means employed to bring about the unification of maritime law are numerous.⁴

¹ *Pardessus*, "Collection des lois maritimes", Vol. I, p. 2. Cf. *De Courcy*, "Questions de droit maritime", Vol. I, preface, p. 5.

² "Bulletin du Comité maritime international" (1905), No. 12, p. 103.

³ For example, France is hostile to the extension of the principle of the liability of owners; the United States refuses to do away with the lien for supplies and repairs; Great Britain has been unwilling to abandon the lien in the case of damage through collision; etc.

⁴ *Pillet*, "Projet de loi conventionnel uniforme en matière de lettre de change et de billet à ordre" (Hague Conference, June 20–July 25, 1910), in *Clunet's "Journal de droit international privé"* (1911), p. 385; *Gali-bourg*, "L'Unification du droit maritime" (Angers, 1912).

1. The simplest and most practical is the adoption by *mutual agreement upon a general custom* as a substitute for the rule of national law. Wherever derogation of the written law is permitted, it is possible to arrive by agreement at a uniform rule. This is a return to the common usage of the trade, in preference to the rule of the Code. Doubtless a formal agreement is necessary; but such clauses very soon become matters of course. Thus, in the great majority of countries to-day, the insertion of the negligence clause in bills of lading liberates the carrier from liability for the acts of his agents, in spite of the words of the law. Again, in almost all contracts of carriage, the freight is stipulated as owed in any eventuality. So almost everywhere the insurance policy contains very similar rules. Identity of interests brings with it uniformity of contracts.

It is possible to extend this field of contractual rule. The grouping of the parties in interest makes it possible to arrive easily at an understanding. In London, in 1893, the effort was made to create a common model for the contract of affreightment; at Glasgow, in 1901, a type of insurance policy.¹ These attempts, however, were unsuccessful. On the other hand, the International Law Association in its Congresses of York in 1864, and of Antwerp in 1877, elaborated for the subject of general average the York-Antwerp Rules, which, in a great number of countries, have been substituted in practice for the legislative rules.²

This voluntary acceptance of a rule presents great advantages; but it only permits of uniformity if no mandatory law within the State conflicts.

2. *Common International Law.*—The adoption of an international rule breaks down the resistance of mandatory national law. If it is adopted by international convention, there obtain in each country two sets of rules, the national law applicable to nationals, and international rules applicable whenever one of the parties is a citizen of one of the contracting States. As to citizens of other States, the ordinary rules of the conflict of laws are applied.

The Diplomatic Conference of Brussels contented itself with this method of unification. It presents, however, serious difficulties.³ To determine when the international rule is the proper law, is very

¹ The conferences were held by the "International Law Association."

² [See Chapter X, *ante.* — Ed.]

³ *Henri Ripert*, "L'unification du droit maritime et la Conférence diplomatique de Bruxelles" (thesis, University of Aix, 1911).

difficult. The nationality of the vessel was made the test; but the shipper and the shipowners of a contracting country, or third persons injured in an accident occurring in the territorial waters of a contracting country, through the act of a citizen of a non-contracting country, should be able to look to the international rule. Moreover, it involves numerous complications. In the same litigation it is necessary to apply the international rule to citizens of contracting countries, reserving to the others the rule of conflict of laws. Lastly, such a superposition of different rules in the same country necessarily raises a suspicion as to the value of one or the other.

3. *Uniformity of National Legislation* would evidently be the ideal method. The Conference of Brussels recommended this method, but did not venture to prescribe it.¹ The international convention, by this method, becomes the model which each national legislature is to follow. This method seems to me the most practical. A country has no excuse for denying as the national rule what it accepts as the international rule. Belgium and Greece have entered upon this view, modifying their maritime laws in conformity with the international resolutions.

We should not, however, imagine that the adoption of this method is without difficulty. Aside from the dangers presented by a fluctuation of domestic law at the whim of diplomatic expediency,² and from the constitutional difficulty of voting a law similar to the treaty,³ even the adoption of uniform national laws could not bring about a complete uniformity of law. The truth is that we must reckon with judicial interpretation. A written law can neither foresee everything, nor foresee anything clearly. The same law, interpreted in different countries by judges, learned in their own national law, imbued with their own national traditions and habits, and using their own juristic methods, will appear very

¹ The international convention for the protection of submarine cables, and the convention for the regulation of fishing rights in the North Sea, stipulated an obligation upon the different governments to secure the passage of national laws conforming to the convention within the period of a year. In the same way, the draft of a convention upon bills of exchange, voted at the Hague in 1911 (Art. 1, § 1), indicates that the Governments bind themselves to adopt a law upon the bill of exchange, annexed to the convention, and to put it in force at the same time as the convention.

² Belgium, by its legislative reform of 1908, adopted rules accepted by the Conference of Brussels of 1905; but these international rules have been modified; Belgian legislation must, therefore, be revised again. An international convention never remains as adopted for more than a few years. That is a short period for the life of a law.

³ *Pillet, ibid., Clunet's "Journal", etc., supra (1911), no. 391.*

different at the end of a few years. So true is this that it has even been thought advisable to create an international jurisdiction for the application of this international law. But, obviously, recourse to this sort of High Court could only be exceptional. Perhaps the inconvenience of divergent interpretation would be reduced, did there exist in each country a special jurisdiction charged with the settlement of marine causes. I see no means of making it disappear entirely.

§ 6. **Modern Attempts at Unification.** — In spite of these difficulties, the labor of unification has been very energetically pursued these last years.

We must mention first, in this regard, the work of the International Law Association, which in numerous meetings has discussed problems of maritime law.¹

The Antwerp Conference of 1885 on Commercial Law proposed, along with a uniform rule of conflict of laws, a draft of international maritime legislation.² The Congress of Brussels of 1888 resumed the study of the same questions.³ Both failed, by having undertaken too vast a program at sessions which were too brief.⁴ The Congress of Genoa of 1892,⁵ which met on the occasion of the Columbus celebration, gave no positive results of a more serious nature. In 1897 Belgium, which is well situated to suffer from the diversity of maritime law, undertook an enduring effort toward unification. MM. L. Franck and Ch. Lejeune founded at Antwerp the "Comité Maritime International" under the presidency of M. Beirnaert, President of the Belgian Council of State. This Committee constitutes a permanent body, serving to link together the national associations existing in every country. The "Association Française de Droit Maritime" was created the same year

¹ Brussels (1895), on collision, *cf.* "Revue internationale du droit maritime", Vol. XI, pp. 393 and 536. York (1864), Antwerp (1877), Liverpool (1890), Antwerp (1903), on general average, *ibid.*, Vol. XIX, 792. Budapest (1908), on effects of a strike. London (1910), on liability of shipowners, *ibid.*, XXVI, 407.

² (Sept. 27 to Oct. 3); *cf.* "Actes officiels du Congrès" (Brussels, Larcier; Paris, Pedone; 1885); *Clunet's "Journal"*, etc., *supra* (1885), p. 593; "Revue internationale du droit maritime", Vol. I, p. 134.

³ (Sept. 30 to Oct. 6); *cf.* "Actes officiels du Congrès" (Brussels, Larcier; Paris, Pedone; 1888); "Revue internationale du droit maritime", Vol. IV, p. 369.

⁴ Especially since, in addition to maritime law, certain questions of commerce by land were discussed, notably the unification of the law of negotiable instruments.

⁵ *Cf.* "Revue internationale du droit maritime", Vol. VII, p. 383; *Clunet's "Journal"*, etc., *supra* (1893), p. 79; "Annales de droit commercial" (1892), pp. 2, 156; "Bulletin de la Société de législation comparée" (1893), p. 81.

through the initiative of MM. Autran and Verneaux. To-day there is a national Association of Maritime Law in twenty-one countries. Each problem is studied in the national association, later in the conferences held by the committees, and often by committees meeting in the interim between the conferences. It is reconsidered many times, with the result that an understanding is reached much more by common conviction than by a vote which tends to divide opinion.

The labors of the "Comité Maritime International" are considerable.¹ Following is a list of the meetings and subjects treated:

1. Brussels Conference (1897): collision and salvage.²
2. Antwerp Conference (1898): collision and salvage, liability of shipowners.³
3. London Conference (1899): same subjects.⁴
4. Paris Conference (1900): same subjects.⁵
5. Hamburg Conference (1902): salvage, jurisdiction in questions of collision, liens, and mortgages.⁶
6. Amsterdam Conference (1904): same subjects.⁷
7. Liverpool Conference (1905): liability of shipowners, liens, and mortgages.⁸

¹ General bibliography: *R. Verneaux*, "Les premiers travaux de l'association française de droit maritime", *Clunet's "Journal"*, etc., *supra* (1898), p. 277; "Travaux et résultats relatifs à l'unification du droit maritime de 1897 à 1907", *ibid.* (1908), p. 56; "L'unification du droit maritime", in "Revue politique et parlementaire" (Sept. 1911); *Yseux*, "Le Comité maritime international", *Clunet's "Journal"*, etc. *supra* (1898), p. 273; *Hennebicq*, "Les derniers travaux du Comité maritime international", in "Revue économique internationale" (Aug. 1906); *Govare*, "Études sur les tentatives faites en vue de l'unification du droit maritime", in "Revue du droit international privé et du droit criminel" (1905), p. 593; *cf.* also: "Bulletin du Comité maritime international"; "Bulletin de l'association française de droit maritime"; "Annales de droit commercial" (1898), p. 332, and (1900), p. 251.

² "Bulletin du Comité maritime international", no. 1; "Revue internationale du droit maritime", Vol. XIII, p. 496.

³ "Bulletin du Comité maritime international", nos. 2-5; "Revue internationale du droit maritime", Vol. XIV, p. 427.

⁴ "Bulletin du Comité maritime international", no. 6; "Revue internationale du droit maritime", Vol. XV, p. 275.

⁵ "Bulletin du Comité maritime international", nos. 7-9; "Revue internationale du droit maritime", Vol. XVI, p. 276 (*Marais*).

⁶ "Bulletin du Comité maritime international", no. 10; "Revue internationale du droit maritime", Vol. XVIII, p. 328 (*Fromageot*); *Clunet's "Journal"*, etc., *supra* (1903), p. 568.

⁷ "Bulletin du Comité maritime international", no. 11; "Revue internationale du droit maritime", Vols. XIX, p. 628; XX, pp. 473 and 807; XXI, p. 146 (*Verneaux*); *Clunet's "Journal"*, etc., *supra* (1905), p. 766; "Annales de droit commercial" (1904), p. 325.

⁸ "Bulletin du Comité maritime international", no. 12; "Revue internationale du droit maritime", Vol. XXI, p. 249 (*G. Marais*); *Clunet's "Journal"*, etc., *supra* (1905), p. 1159.

8. Venice Conference (1907): same subjects, conflict of laws on the subject of freight.¹

9. Bremen Conference (1909): conflict of laws on the subject of freight, liability in cases of accidents to persons.²

10. Paris Conference (1911): same subjects.³

Official Action.—The work of the "Comité Maritime International" was such that it had necessarily to be followed up by official action. The Diplomatic Conference of Brussels brought together official delegates of the different Governments, with a view to adopt a convention embodying an international law.

The first session (February 21–26, 1905) represented only thirteen governments; the two most important maritime powers refrained from sending delegates. It was impossible to undertake more than a brief study of the draft on the subject of collision and salvage.⁴ The second session (October 16, 1905) found additionally the delegates of England and Germany present, and recommenced the study of the draft.⁵ The third session (September 28, 1909), brought together the delegates of twenty-six Governments. New drafts were taken up on the limitation of the liability of the shipowner, mortgage, and marine liens.⁶ Finally, the fourth session (September, 1910) reached a vote on the two conventions upon collision and salvage, and took up again the study begun on the other subjects in 1909.⁷

¹ "Bulletin du Comité maritime international", nos. 13 to 19; "Revue internationale du droit maritime", Vol. XXIII, pp. 556 and 715 (*Barbey*); *Clunet's* "Journal", etc., *supra* (1909), p. 310; "Annales de droit commercial" (1908), p. 65; "Revue de droit international privé, etc." (1907), p. 385.

² "Bulletin du Comité maritime international", nos. 20 to 24; "Revue internationale du droit maritime", Vol. XXIV, p. 692 (report of the Paris Commission); XXV, p. 283 (*Austran and Gautier*); "Annales de droit commercial" (1910), p. 172.

³ "Bulletin du Comité maritime international", nos. 25 *et seq.*; "Revue internationale du droit maritime", Vol. XXVII, p. 406 (*Gautier*); "Annales de droit commercial" (1912), p. 251 (*Ripert*).

⁴ "Bulletin du comité maritime international", no. 12, p. V; "Revue internationale du droit maritime", Vol. XX, p. 657.

⁵ "Revue internationale du droit maritime", Vol. XXI, p. 270; *Clunet's* "Journal", etc., *supra* (1907), p. 273 (*Franck*); "Revue du droit international privé", etc. (1905), p. 593 (*Govarc*); "Annales de droit commercial" (1906), p. 258.

⁶ "Revue internationale du droit maritime", Vol. XXV, p. 702; "Annales de droit commercial" (1910), p. 172.

⁷ "Revue internationale du droit maritime", Vol. XXVI, p. 42 (*Franck*); "Annales de droit commercial" (1910), p. 488, and (1911), p. 312 (*G. Ripert*); "Bulletin de l'Association française du droit maritime" (1911), nos. 47, 48, and 50; "Revue de droit international privé", etc. (1912), p. 169; *Lyon-Caen*, "De l'unification des lois maritimes", in "Bulletin de l'Académie des sciences morales et politiques" (1910), p. 469; *Henri Ripert*, "Les conventions de Bruxelles et l'unification du droit maritime" (thesis, University of Aix, 1911).

The vote of these Conferences is of capital importance. In spite of the reservations attaching to some of the signatures, and in spite of certain difficulties of application, their ratification will mark an undoubted progress. Unfortunately, upon the other subjects studied, common understanding seems more difficult.

We should not have too many illusions over the elaboration of this universal maritime law. However, it may already be counted as considerable progress that the advantages of unification are realized.¹

¹ We should recall that the Hague Conference (June 23 to July 25, 1910), had tried, two months before, to reach uniformity on the subject of bills of exchange; *cf. Clunet's "Journal"*, etc., *supra* (1911), p. 385.

CHAPTER XII

THE PROGRESS OF UNIFICATION BY INTERNATIONAL BODIES OF OFFICIAL EXPERTS

BY PAUL S. REINSCH¹

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| § 1. Impulses to Regulation by Official Expert Unions. | § 13. Insurance. |
| § 2. The Telegraphic Union. | § 14. The International Prison Congress. |
| § 3. The Radiotelegraphic Conference. | § 15. International Sanitation. |
| § 4. The Universal Postal Union. | § 16. The International Opium Commission. |
| § 5. The International Union of Railway Freight Transportation. | § 17. The Geneva Convention. |
| § 6. The Automobile Conference. | § 18. Fisheries Police. |
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| § 10. Protection of Labor. | § 22. The South American Police Convention. |
| § 11. The Sugar Convention. | |
| § 12. Agriculture. • | |

§ 1. **Impulses to Regulation by Official Expert Unions.** — The dominant note of political development during the nineteenth century was undoubtedly nationalism, and the political forces of the century, intricate and involved as their action was, may be understood and analyzed with the greatest clearness from the point of view of the struggle for complete national existence and unity which was going on in all the principal countries of the earth. Nations are readily personified, and there is a unity and sequence in their action which makes it appear very concrete when compared with other political influences and movements. Thus toward the end of the century, after the great struggles in the United States, Germany, and Italy had been decided in favor of the national principle, it seemed as if the latter were bound to exercise an almost exclu-

¹[American Minister to the Republic of China; formerly Professor of Political Science in the University of Wisconsin, and Delegate of the United States to the Third and the Fourth Pan-American Conferences.]

This Chapter forms Chapter II (pp. 12-67) of the author's treatise entitled "Public International Unions, their Work and Organization; A Study in International Administrative Law" (Boston, 1911, published for the World Peace Foundation, by Ginn and Company.) —ED.]

sive sway over the future destinies of humanity, — as if the twentieth century would be taken up with a fierce economic and military competition among the nationalities who had achieved a complete political existence. Under such conditions diplomacy and international action would have had for their main function the maintenance of a political balance or equilibrium which would prevent the undue aggrandizement of any one state or nation. Such, indeed, had been the original and continuing purpose of diplomatic action.

Yet, notwithstanding the definiteness and energy with which the action of nationalism asserted itself in nineteenth-century politics, the force of its current was all the time being diminished and its direction modified by that other great principle of social and political combination which we may call internationalism, and which comprises those cultural and economic interests which are common to civilized humanity. During the Middle Ages the unity of civilization rested largely upon a cultural and religious basis. In our own age such bonds of union have been powerfully supplemented by the growing solidarity of economic life throughout the world, as well as by the need in experimental and applied science to utilize the experience and knowledge of all countries. The existence of such an underlying economic unity of the civilized world has been borne in upon the nations with greater force every succeeding year. The development of the facilities for communication, bringing with them a great increase in the intercourse and exchange of commodities among nations, first convinced the latter of the need of international arrangements of an administrative nature. The inconveniences and delays caused at the point of transit from one national territory to another by the existence of different administrative methods and harassing regulations were such a serious impediment to the natural currents of trade that they could not long be tolerated. It was thus that a strong demand arose for the regulation of the international telegraph and postal service, of transfer of freight on railways, and, in general, of all matters affecting international communication. It is not difficult to see the impulse toward joint action which would arise from relations such as those mentioned.

Other interests, such as manufacturing and insurance, while sensitive to the importance of international economic relations, were not so directly and inevitably affected as was transportation. Yet in these fields another principle became powerfully active, inducing nations to seek for a coöperative procedure in matters of

industry and other economic enterprise. This principle is found in the need of raising the level of competition. It was soon discovered that after a nation had, within its territory, introduced some improvement in the condition of its industries and its labor, such as required an additional expenditure of money, its industries might, at least for a while, be seriously threatened by the competition of those countries in which such regulations had not as yet been adopted. The industrial interests which might at first have opposed the introduction of such measures of protection now became eager partisans of their extension to competing nations by means of treaties and administrative arrangements. The international movement for improving industrial and social conditions therefore found powerful support not only among men who had originally favored such reform, but among those interests which, through its introduction in certain nations, had been placed in a position of disadvantage in international competition. This is the ground for international action in matters affecting agriculture, labor, sugar production, and similar economic activities. Closely allied to this development and preceding it in time is the movement for the international protection of patents and copyrights.

A third cause for international action arises where a number of nations find themselves threatened by conditions existing in less civilized countries, and also where the instrumentalities and processes of their economic activities extend upon these as beyond national jurisdiction. Thus the safeguarding of public health against the importation of epidemics, and the protection of submarine cables in high-sea areas became the subject matter of agreements for international administrative action.

Civilized nations, being desirous of conducting their affairs in the most scientific and effective fashion, feel the need of making use of experience and knowledge wherever they may be found. Recognition of the fact that no people has a monopoly of the best scientific and administrative processes has led the nations to seek opportunities for the interchange of experience such as are afforded by congresses of experts in various fields of public activity. Many of the unions formed more directly for administrative purposes also incidentally act as centers for the exchange of reliable information.

The number and extent of the international activities already entered upon are surprising. It is not so much the case that nations have given up certain parts of their sovereign powers to international administrative organs, as that they have, while fully reserv-

ing their independence, actually found it desirable, and in fact necessary, regularly and permanently to coöperate with other nations in the matter of administering economic and cultural interests. Without legal derogation to the sovereignty of individual states, an international *de facto* and conventional jurisdiction and administrative procedure is thus growing up, which bids fair to become one of the controlling elements in the future political relations of the world.

In order to give an adequate account of these important movements a monographic study of each of them would be necessary. No more will be attempted in the present chapter than to give an indication of the main historical facts concerning the formation of these various unions, and the conventions upon which they rest. Special attention will be given to the initial difficulties in the way of reaching such agreements, and to the manner in which those existing were, as a matter of fact, concluded. The diplomatic and administrative agencies employed in the formation of these unions, or created for their purposes, will be reviewed, as well as the influence of private initiative and associated effort in bringing about joint action by the governments. We shall also note the functions attributed to the international organs, and the main administrative principles and methods established. The present chapter will be confined to a brief account of the various unions from these points of view.¹

I. COMMUNICATION

§ 2. **The Telegraphic Union.**² — (*L'Union des administrations télégraphiques.*) The first important international administrative

¹ General References: *Poinsard, L.*, "Droit international conventionnel", 1896; "Le droit international au XX^e siècle", Paris, 1907; *Moynier, G.*, "Les bureaux internationaux", Geneva, 1892; *Kazanski. P.*, "The General Administrative Unions of States" (in Russian), Odessa, 1897; *Kazanski*, "Die allgemeinen Staatenvereine", in "Jahrb. d. internat. Vereinigung", Vol. VI, Berlin, 1904; *Descamps*, "Les offices internationaux", Brussels, 1894; *Lavollée*, "Les unions internationales", in "Rev. d'hist. dipl.", Vol. I, p. 331; *Fiore*, "L'organisation juridique de la société internationale", in "Revue de droit international", 1899, pp. 105, 209; *Olivart, Marqués de*, "Tratado de derecho internacional público", Vol. II, Madrid, 1903; *Ullmann*, "Völkerrecht", p. 282; *Field, D. D.*, "Draft Outlines of an International Code", 1872; *Oppenheim, L.*, "International Law", Vol. I, 1896; *Schücking, W.*, "L'organisation internationale", "Revue générale de droit international", Vol. XV, p. 5; *Nippold, O.*, "Verfahren in völkerrechtl. Streitigkeiten", chap. I, Leipzig, 1907. "Annuaire de la vie internationale", A. H. Fried, ed., Brussels, contains valuable data on international unions; Edition 1908-1909 contains the organic laws of most of the unions, public as well as private.

² *Fischer, P. D.*, "Die Telegraphie und das Völkerrecht", Leipzig, 1876; *Saveney, E.*, "La télégraphie internationale", "Revue de deux mondes",

union to be established was the telegraphic union. From 1849 on, treaties had been made between individual European states concerning telegraphic communication. In 1850 an Austro-German telegraph union was organized; another union embraced France, Belgium, and Prussia; and through the convention of October 4, 1852, at Paris, all continental states which at that time had state telegraphs regulated the mutual relations of their services. Through such conventions as these the international relations in this matter were made more satisfactory, without, however, securing that uniformity and regularity which the interests of the various nations really demanded. The desire to attain such uniformity by a universal union led to the convening of a conference at Paris in 1865. Twenty states were represented by their diplomatic agents at Paris, assisted by expert delegates. The conference, therefore, had the double character of a diplomatic congress and a meeting of expert representatives of the various administrations. The results of the work of the conference were, in accordance with this double character, divided into a convention, or treaty, signed by the diplomatic representatives, and a "règlement" controlling the administrative details, which was signed by the expert delegates. These conventions resulted in a great simplification of the international service as well as in a considerable reduction in the tariff rates. Many difficulties of local opposition had to be overcome before an agreement could be reached. The discussions of the conference are of exceptional interest, as it constitutes the first important attempt to arrange for permanent coöperation between sovereign states in administrative matters. As a precedent for international action, the conference of Paris must be accorded a very high importance. The telegraphic union which was thus formed embraced all the states represented, and to these were added, during the subsequent three years, eight other states and colonies.

The first regular conference of the union took place at Vienna in June, 1868. The double nature of the conference — composed of diplomatic and technical representatives — was preserved on this

September and October, 1872; *Renault, L.*, "Rapports internationaux; La poste et le télégraphe", Paris, 1877; *Carmichael, E.*, "The Law relating to the Telegraph, the Telephone, and the Submarine Cable", London, 1903; *Kazanski, P.*, "L'union télégraphique internationale", "Revue de droit international", 1897, p. 451; *Meili*, "Die internationalen Unionen, etc.", Leipzig, 1889; *Rolland, L.*, "De la correspondance postale et télégraphique", 1901; "Journal télégraphique", Bern, since 1869; "Archiv f. Post u. Telegraphie", Vol. XXXII, pp. 65-89; Treaties in "Archives diplomatiques."

as well as on subsequent occasions. Five more members were admitted at this time, including the telegraph administration of British India. The most important act of the conference of 1868 was the establishment of a bureau having its seat at Bern, and acting as a central organ of the union. At the conference at Rome, in 1871, representatives of important private telegraph companies were admitted as advisory members. The conference at St. Petersburg (1875) recast the constitutional form of the union by distinguishing more carefully between the matters to be dealt with in the diplomatic convention and those to be included in the "règlement." The convention was made, in a way, the constitution of the union, laying down the fundamental principles which were accepted as expressing the essential relations and duties of the members and the permanent basis of the administration. The "règlement", on the other hand, was composed of those administrative regulations by which the details of the administration were fixed, and which were susceptible of gradual modification, corresponding to changes in the character of the administrative relations. A similar basis of division had been used the preceding year in the formation of the general postal union. Among the matters which were laid down by the convention are the general classification of telegrams, the admission of cipher dispatches, conditions of suspending the service, and the right of declining responsibility for loss. The details of the tariff and the application of the above rules are fixed by the "règlement."

Among the principles established by the convention, the following are of general interest: the secrecy of correspondence is to be guarded; the governments do not admit any responsibility on account of the service of international telegraphy, particularly for damages caused by delay in delivery of messages; special wires are to be used for the international service. Telegrams are divided into three classes, — state telegrams, service telegrams, and private telegrams. The contracting parties reserve the power to stop the transmission of every private telegram which may seem dangerous to the state or contrary to its laws; when judged necessary, the telegraph service may be suspended entirely or partially. The convention further established the central organ or bureau mentioned above, and laid down a definite basis for international tariffs of charges. Periodical administrative conferences are to be held for the purpose of revising the convention and the "règlement"; in the deliberations, each public telegraph administration has the right to one vote. The revisions decided upon by the conference

do not come into force until they have received the approbation of all the contracting states.

The telegraphic union is at the present time composed of forty-eight states and colonies. Its regulations are observed also by the submarine cable companies. The union comprises all the important countries of the world with the exception of the United States, China, Mexico, Peru, and Canada. It is likely that China will be a member before long. As only a very small fraction of the telegraph lines in the United States is under federal control, the government is not in a position to fulfill the main requisite to becoming a member of the union, namely, "being in a position to insure the general acceptance of the principles and rules of the international telegraph conference on the part of the private companies within its territory." Hence the repeated invitation to become a member has had to be declined. The American government has however been represented at the recent conferences of the union by delegates who are accorded the right to speak, but who do not vote.

The great increase in telegraphic communication in the last quarter century is shown in the following table from a United States government report, giving the combined statistics of all the countries in the union :

	DOMESTIC TELEGRAPHS	INTERNATIONAL TELEGRAPHS	TOTAL
1868	19,961,925	5,678,405	25,640,338
1885	132,090,116	13,339,742	145,429,858
1905	310,201,679	82,196,656	392,398,335

In 1868 the telegraph lines of the countries belonging to the telegraphic union (including cables) had a total length of 135,378 miles; in 1885 it had increased to 407,997 miles; and in 1905, to 786,340 miles.

The international telegraphic bureau began operations on January 1, 1869. It is under the supervision of the Swiss government, and its expenses are met by the states in proportion to the importance of their telegraphic intercourse. Its original budget allowance was only 50,000 francs a year, of which, as a matter of fact, only 65 per cent on an average was used during the earlier period. The conference at St. Petersburg increased the budget to 60,000 francs, and it now stands at 100,000 francs a year. The attributes of the bureau as determined by the convention are as follows: It is to collect information concerning international telegraphy; to

give due form to demands for changes in the tariffs and in the service regulations, and to give notice of such changes; and to make special studies and investigations when so directed by the conferences of the union.

The "règlement" provides that the various telegraphic administrations shall keep each other informed, through the intermediary of the bureau, of all changes and improvements in their service and of interruptions in communication. They shall also furnish to the bureau all statistical information, so as to enable it to issue a complete annual account of the international telegraphic services. At the periodic conferences of the union, a program, worked out beforehand under the initiative of the state where the conference is to be held, and in consultation with the other governments interested, forms the basis of discussion. Committees are appointed to consider in detail the various propositions. The resolutions of the conference are not binding until accepted by all the administrations of the contracting states, although for their adoption by the conference only a majority vote of the delegates present is necessary. A change of the fundamental convention would of course require the diplomatic action of all the treaty powers. It is a general principle illustrated by the telegraphic union that in such combinations the sovereignty of each member demands that an important act of the union should be undertaken only by unanimous consent; but the members of the union, of course, remain free to conclude among themselves special agreements, not conflicting with the general treaty, which their special situation and interests may require. Should certain members refuse to accede to the establishment of a proposed reform, those desiring the change may form a *restricted union* for such special purpose.

§ 3. **Wireless Telegraphy.**¹—The invention of wireless telegraphy raised many novel problems in international law and administration. The legal questions involved are of great interest, even when considered only from the point of view of an individual sovereignty; but as telegraphy is an operation which is an essential part in the intercourse between nations, the method and manner of telegraphic communication and the rules regulating it could not have been satisfactorily settled without resorting to international

¹ *Meili, T.*, "Die drahtlose Telegraphie," Zürich, 1908. *Landsberg, A.*, "Die drahtlose Telegraphie", Marburg, 1909; *Fauchille, P.*, "Le régime aérien, etc.", "Revue générale de droit international", Vol. VIII, p. 414; *Rolland*, "La télégraphie sans fil", "Revue générale de droit international", Vol. XIII, p. 58; *Lorentz*, "Les câbles sous-marins et la télégraphie sans fil", Nancy, 1906; "Docum. de la conférence radiotél. de 1906", Berlin; "Report of Select Committee", "Parl. Sess. Papers", No. 246, London, 1907.

agreement. As there had been an attempt on the part of Great Britain to build up a radiotelegraphic monopoly, other nations in self-defense favored an agreement by which such narrow control of an international service would be prevented. A preliminary conference on radiotelegraphy took place in Berlin in 1903. This was followed by a more formal conference in 1906, at which a convention was framed and adopted. The convention is accompanied by a protocol containing subsidiary arrangements, as well as a "règlement" defining more in detail the principles of the convention and laying down rules for the administration. The principal provisions of the convention are as follows: Coast stations and stations on ships are bound to exchange radiotelegrams without discrimination against any system. Wireless stations must accept appeals for aid from ships in distress in preference to any other messages. Inland stations must be connected with the coast stations by special wires. Naval and military stations can of course be maintained and they will not be subject to the duty of furnishing public service. The provisions of the convention and "règlement" may be changed by common accord among the contracting parties. Conferences of plenipotentiaries or simple administrative conferences shall take place periodically, the former dealing with the convention, the latter with the "règlement." In these each country is entitled to one vote. Colonies or protectorates may be admitted to the union on their own account. A bureau is established, charged with furnishing every kind of information upon radiotelegraphy, giving notice of changes in the convention or "règlement", and in general performing all administrative labors in the interest of international radiotelegraphy. In case of dispute between two or more governments concerning the interpretation or execution of the convention, the question may be submitted to arbitral decision. Each litigant then chooses another government as arbiter; if these do not agree, they may choose a third government as umpire. The Italian delegation, while signing the convention, made a reservation to the effect that their government could not ratify until the expiration of its contracts with the Marconi Company. In the end the conference did not create a separate bureau, but charged the telegraphic bureau at Bern to act as a central office of correspondence and information in connection with radiotelegraphy, and authorized it to spend 40,000 francs a year for this branch of the service.¹

¹The union for the protection of submarine cables will be taken up in connection with international police arrangements.

§ 4. **The Universal Postal Union.**¹ — The industrial and commercial development of the early nineteenth century brought with it a remarkable growth in postal business. The carrying of letters and other missives, originally a private enterprise, had been generally assumed by the various states during the second half of the eighteenth century, although it was only as recently as 1867 that the private postal service of the Thurn and Taxis family was taken over by the Prussian government. As the postal system of each state was an independent unit, and had practically no administrative relations with other postal services, there was a great complexity in arrangements and rates as far as international business was concerned. This was exceedingly cumbersome and constituted a great impediment to commerce. Not only were the rates of postage very high, but the tariffs were confused by the fact that the charges varied according to the respective route of transit. Thus, for instance, there were three different rates between Germany and Austria, five different rates between Germany and Australia, four different rates between Germany and Italy, according to the particular route taken by the letter. Postage between Germany and Italy, for instance, varied from forty-eight to ninety pfennigs per letter. A letter from the United States to Australia would pay either five, thirty-three, forty-five, or sixty cents, or \$1.02 per half ounce, according to the route by which it was sent. Mail service was by no means frequent, but the fact that a letter was prepaid for a certain route often prevented it from taking advantage of a quicker means of communication. It might just have missed the mail for which it was prepaid, by a few hours, but would have to wait until another mail left by the same route before it would be forwarded. Charges in general were very high; thus the rate upon a registered letter between Berlin and Rome amounted to four marks and ten pfennigs. In making up a through rate, the transit charges of every country whose administration handled the letter would be included. The accounts of such mutual charges were exceedingly complicated and it took a vast amount of clerical work to keep them balanced. Further difficulty was introduced through the difference in weights and in currency, all of which had to be taken account of in computing rates. It will be apparent

¹ *Weilhase, H.*, "Geschichte des Weltpostvereins", Strassburg, 1899; *Rolland, Meili*, *op. cit.*; *Schroeter, C.*, "Der Weltpostverein", 1900; *Krains, H.*, "L'Union postale universelle", 1908; "L'Union postale", Bern, since 1875; Treaties of October 9, 1874, June 1, 1878, and May 26, 1906, in "Archives diplomatiques;" "L'Union postale universelle", published by the international bureau at Bern, 1900.

from these few facts and examples that the service lacked that rapidity and cheapness which alone could make it a real influence in the development of world-wide business relations. A remedy could be created only through international action. Nor were treaty arrangements between individual nations sufficient to solve the problem. What was needed was an understanding between all the civilized nations of the world.

Beginning with the year 1802, a large number of conventions for the purpose of regulating postal communication were concluded by groups of two or more nations. After the middle of the century this international interest assumed such proportions that the establishment of a régime of uniform regulations appeared highly desirable. In 1862 the United States government officially took the lead in this matter; the Department of State called attention to the many inconveniences arising from the lack of unity, and suggested the holding of an international postal conference. Such a conference accordingly assembled at Paris in May and June, 1863, on which occasion fifteen states were represented; though its avowed purpose was not as yet to produce definite treaty regulations, but, on the basis of full and free discussion, to clear up the general principles which should dominate international postal administration. Many practical difficulties in the way of a unified system revealed themselves, especially in connection with the freedom of transit and the division of the proceeds from mail passing through two or more jurisdictions. In its resolutions the conference declared itself in favor of thirty-one principles, which covered, among other matters, the transmission of letters with declared value and of inferior classes of mail, a uniform system of tariffs, and the establishment of fixed transit dues.

In the subsequent decade not much progress was made, but in 1869 the German postal union began to negotiate for the calling of a new congress. The Franco-German War interrupted these negotiations, but they were taken up again at its conclusion, and finally Switzerland convoked a conference to meet in September, 1873. Russia and France at first indicated their unwillingness to take part in the enterprise. The French administration believed that the formation of a postal union would cause it severe financial loss on account of the lowering of transit charges. This consideration, combined with the fact that the movement had been initiated by the German government, led to the reluctant attitude assumed by France. Public opinion and business interests, however, compelled her to join in the formation of a union, even at the loss of five

million francs a year in postal income. Thus after a short delay Russia and France agreed to meet, and the conference finally came together on September 15, 1874. The points to be considered had been very carefully prepared by the German postal administration, under the guidance of Postmaster-General Stephan, and the conference, therefore, was enabled immediately to enter upon the discussion of specific problems of organization.

Twenty-two states were represented at the conference; the delegates were in most cases the heads of postal administrations, or high officials connected with the same. The excellence of the preparatory labors enabled the congress to finish its work in less than four weeks, and in this short time to create the constitution and regulations of the General Postal Union. As in the case of the telegraphic union, a convention fixed the general principles upon which the union and its administrative work are based, while details were worked out in a "règlement." The leading principles established were the complete freedom of transit from one jurisdiction to another, and the creation of a practically unified postal territory comprising all the treaty states. It is, of course, necessary to distinguish between freedom and gratuitousness of transit. The latter could not possibly be established, for states of central location, like Belgium and France, had too large and direct a financial interest in the matter; but transit charges were reduced to fixed payments on the total net weight. This swept away the whole maze of accounts; at present mails in transit are weighed during four weeks every six years, as a basis for charges. The postal convention of 1874 was ratified by the action of the diplomatic representatives of the powers at Bern, in May, 1875.

A very important postal congress was held at Paris in 1878. The French representatives favored the conclusion of an entirely new convention, but the action taken did not go beyond a modification in some details of the convention of 1874. The union at this time assumed the name of Universal Postal Union. The number of states and colonies represented had risen to thirty-two. While the organization of the union was not materially modified, the voting right of colonies was regulated so as to give one vote each to British India and Canada, and one vote each to the combined French, Spanish, Dutch, Portuguese, and Danish colonies. Subsequent congresses (Lisbon, 1885; Vienna, 1891; Washington, 1897; Rome, 1906) concerned themselves very largely with the details of administration. The congress of Vienna, however, instructed the international bureau of the postal union to act as a

clearing house for the adjustment of the mutual financial claims of the various national postal administrations. Each administration forwards to the bureau a monthly statement of its accounts with every other national administration. The bureau balances these accounts, collects from the administrations whose balance is unfavorable, and pays over the proceeds to the nations entitled to a credit. This congress also provided for an international exchange of newspaper subscriptions. In many European states subscriptions to periodicals and newspapers may be arranged for through the postal service. The extension of this system so as to enable a subscriber to give his order and pay his subscription for some paper published in a foreign country, at the post office of his home town, was made possible by the arrangements adopted at Vienna. At this congress the Australian colonies were admitted to the union with the right of one vote. The congress of Rome, in 1906, agreed upon a further reduction in the charges by permitting a greater weight to be carried in letters. By divers groupings of member-states, numerous restricted unions for special purposes have been formed.

The convention of the universal postal union, as revised by the congress of Rome in 1906, lays down certain principles of law regarding the relations and duties of the various postal administrations, and establishes the organization of the union as well as the functions of congresses, conferences, and of the bureau. The right of transit is guaranteed throughout the entire territory of the union. Transit charges, to be paid to each of the countries traversed, are based upon weight and distance. Thus, for instance, one franc fifty centimes is paid per kilogram of letters for distances not exceeding three thousand kilometers. The rates of postage on the different classes of mail matter are fixed on a uniform standard throughout the entire extent of the union; the rates for registry, too, are made uniform, although non-European countries are allowed to charge a double fee. The congress of Rome established the principle that postal administrations are responsible for the loss of a registered article, to the amount of fifty francs. It also provided for prepaid reply coupons, which are issued in all the countries of the union and may be sent to any other country, there to be exchanged for a stamp to frank the reply. The convention contains special prohibitions with respect to things not to be sent through the international mails, though it "does not impliedly alter the legislation of any country as regards anything not expressly provided for by its stipulations"; nor does it restrict the right of the contracting

parties to conclude treaties with a view to making special postal arrangements with each other.

The duties of the various organs of the union are outlined in the convention. The administrative organ of the union is the international postal bureau, located at Bern. It is under the supervision of the Swiss government. Its duties are to gather, publish, and distribute information of all kinds on the international postal service; upon the demand of the parties interested, to give advice on controversial questions; to give regular form to propositions for the modification of the "règlement"; to notify the various administrations of adopted changes; to facilitate the operations of international accounting; and, in general, to make such studies and engage in such work as shall be in the interests of the postal union. The official language is French, and the bureau publishes a monthly journal, "L'Union postale", in French, English, and German. A very important article of the convention provides for the settlement of disputes by arbitration. In any case of disagreement upon the interpretation of the convention or concerning the responsibility of any administration, each of the governments concerned chooses another member of the union not directly interested in the matter; if necessary, the arbitrators thus selected choose another administration as umpire. Decisions are determined by a majority of votes.

A congress of the union shall be held not later than five years after the acts adopted at the previous congress have entered into force, or it may be called when demanded by two thirds of the governments. The congress is composed of plenipotentiaries empowered to introduce changes both in the convention and the "règlement"; whereas the conference is an administrative body which deals only with the latter. In the interval between meetings of the congress proposals for changes in the convention may be made and acted upon; in such cases six months must be given for the administrations to examine the proposals before communicating their vote. For a change in the more important articles unanimity of votes is required, but articles regulating minor details may be modified by a two-thirds vote. If the question concerns only the interpretation of the convention, a simple majority is sufficient. Countries outside of the union may be admitted to membership upon their demand. The protectorates and colonies belonging to European countries and to the United States are arranged in seventeen groups, each one of which is considered as a single country or administration.

Further important organic arrangements are contained in the "règlement", though the larger part of this is taken up with specific rules concerning the transmission of mail matter and accountability with respect to transit charges. The "règlement" divides the countries of the union into seven classes in order to determine the portion of budget charges to be borne by each. Each class contributes in the proportion of a certain number of units. The annual budget of the bureau at the present time is 125,000 francs. The duties of the bureau are more specifically laid down, and arrangements are made for communications to be addressed to it by the governments; its function of settling and liquidating accounts between the administrations is developed with special minuteness. It is the duty of the international bureau to effect the balance and liquidation of accounts of every description relative to the international postal service between administrations of countries of the union who desire to make use of this service. In 1907 the financial transactions of the bureau acting as a clearing house amounted to 76,916,000 francs.

The "règlement" may be changed in the same manner by the congresses, and in intervals between them by the governments, as in the case of the convention.

It may be noted that the tendency of development in the postal union has not been toward giving greater powers to majorities of member states. In 1878, out of twenty-three articles of the convention only six required unanimity of votes for their modification; at present as many as fifteen require unanimity, while only fourteen may be modified through a smaller vote.

The postal union now comprises all the countries and colonies of the world with the exception of Morocco, Afghanistan, Baluchistan, and a few Pacific islands. China and Ethiopia are the most recent accessions to the union. A conception of the vast extent of the postal business of the world may be gained from the following figures: In 1905 there were mailed in the territory of the union 32,140 million pieces of mail matter; the money-order business amounted to 6432 millions of dollars; the declared value of objects sent amounted to 15,200 million dollars.

In 1909 a beautiful monument was erected at Bern to commemorate the founding of the postal union. Upon the occasion of its unveiling, a great many tributes were paid to the remarkable development and influence of the union. Expressions such as the following from the speech of M. Deucher, president of the Swiss confederation, are significant:

The old assembly house of the Bernese diet bears this inscription : "It is in this building that the universal postal union was founded on October the ninth, 1874." To-day, thirty-five years later, there rises on one of the most beautiful sites of our capital, the grand commemorative monument, the unveiling of which we are met to celebrate.

The five genii which surround the globe represent the universal importance of the union and attest the power gained by a great idea, for the realization of which nations went hand in hand, regardless of the difference of race, language, and religion, political and economic interests, — a triumph of civilization and culture, a bond of union between the peoples of the world. The universal postal union, a work supremely pacific, constitutes a real confederation of the nations, the representatives of which to-day turn their eyes to the international monument and express their gratitude to the master who created it.

A number of restricted unions have been formed for special purposes. The objects for which they were founded are in no way inconsistent with the purposes and activities of the general union, and all of them make use of the international bureau as their agent. There are also a great many treaties between individual countries concerning such matters as special postage rates. The following restricted unions are now in existence: first, the union for the exchange of money orders, founded in 1878 and comprising at present thirty-three states; second, the union for the transmission of packages of declared value registered and insured, founded at the same time and comprising thirty members; third, a parcels-post union, founded in 1880, with a present membership of thirty-nine states; fourth, a union for the collection of payments through the postal service, founded in 1885, with twenty-one members; fifth, a union for the use of books of identity, with twenty members; and sixth, the union for facilitating subscription to periodicals through the postal administration, with twenty-four members. The unions admit new members upon application. Their membership is constantly increasing, and most of them will ultimately coalesce with the general union as their object becomes more universally important. Meetings of these restricted unions are usually held together with the congresses of the universal postal union. The United States is not a member of any of these restricted unions, though it has made special arrangements with some countries, such as Canada, Mexico, Great Britain, and Germany, respecting lower rates of postage and other postal matters.

§ 5. **The International Union of Railway Freight Transportation.**¹

—From the earliest days of railway development in Europe the necessity for international arrangements with respect to the transit of merchandise from one country to another was apparent. As early as 1847 there was founded the union of German railway administrations, which is still in existence, comprising one hundred eight administrations in Germany, Austria, Hungary, Holland, Belgium, Roumania, and Russia. The affairs of the union are administered through the royal railway "direction" at Berlin, and every two years there is a general meeting for the revision of the regulations. The work of the conference is prepared by eight standing committees on various branches of the service, such as freight traffic, passenger traffic, and exchange of cars.

The idea of a more general union for railway transportation was first suggested by two experts, de Seigneux and Christ, of Switzerland, who petitioned the Swiss federal council to call an international conference. Preliminary plans for such a union were worked out in Switzerland and in Germany, and in 1878 the first conference met at Berne. It was composed of expert delegates of the following countries: Germany, Austria, Hungary, Belgium, France, Italy, Luxemburg, the Netherlands, Russia, and Switzerland. The two prime movers for the conference acted as its secretaries. In a session occupying a month, the conference, on the basis of the preliminary studies, worked out the text of a convention concerning railway freight traffic, a convention creating an international commission, and supplementary ordinances. The results of these labors were referred to the various governments which had been represented at the conference. They were carefully studied by the administrations concerned, and memorials suggesting improvements and modifications were handed in by the latter. A second conference was convened in 1881. It also met at Bern, and the same powers were represented. This conference introduced a number of important modifications in the convention. It

¹ "Procès-verbaux des délibérations de la conférence réunie à Berne au sujet d'une convention internationale en matière de transports par chemins de fer", Bern, 1878, 1881, 1886; "Congrès international des chemins de fer, comptes rendus", at the dates and places of various conferences; "Das internationale Übereinkommen über den Eisenbahn- und Frachtverkehr", Bern, 1901; "Zeitschrift für den internationalen Eisenbahntransport", Bern, since 1893; *Rosenthal, Ed.*, "Internationales Eisenbahnfrachtrecht", Jena, 1894; *Olivier, E.*, "Les chemins de fer en droit internat.", Paris, 1885; *Eger, G.*, "Das internationale Übereinkommen, etc.", Breslau, 1893; *Meili*, "Das Recht der Verkehrs- und Transportanstalten", 1888; *Gerstner, Th.*, "Der neueste Stand des Berner Übereinkommens", Berlin, 1901; "Bulletin du Congrès internat. des chemins de fer", Brussels.

suggested the creation of a central bureau in place of the commission provided for by the first conference. So careful were the administrations and governments interested that even yet they were not ready to accept the results of all these labors. After additional consideration a third conference met at Bern in 1886, which molded the convention and the regulations into their final form. It also adopted a protocol for the holding of a final conference of diplomatic representatives at which the convention might receive formal sanction. This meeting ultimately took place in 1890. It accepted the convention as adopted by the third conference, with some minor changes. Ratifications were exchanged on September 30, 1892, and the union as well as its central bureau began operations on January 1, 1893.

The main portion of the convention thus carefully worked out by the best expert talent of continental Europe is composed of a statement of general principles as well as of more detailed rules concerning the transportation of railway freight from one country to another. The fundamental principle established by the convention is that transportation is obligatory, and that therefore no article of ordinary merchandise can be refused acceptance. Among the chief matters included are the continuity of transportation under a single bill of lading, the form of which is determined by the convention; uniform regulations with respect to packing and to the transport of dangerous substances and breakable articles; the responsibility of railway administrations, in international freight transportation, for delays, losses, and damages to goods. The competent tribunal for the trial of railway cases is that of the domicile of the company or administration affected. Judgments are however made executory in any of the contracting countries, without a revision of the substance of the litigation. The arbitration of controversies between different administrations is also provided for. The inclusion of passenger traffic in the convention, though suggested, was not seriously considered at the time because of the feeling that to introduce so difficult a matter might greatly embarrass the achievement of a plan for united action.

The organization of the union as determined by the convention is as follows: The administrative organ is the central bureau, which is located at Bern. Its functions are, first, to receive communications from the contracting states and from the railway administrations interested, and to transmit them to other states and administrations; second, to gather, arrange, and publish information of all kinds which may be important to the interna-

tional freight service; third, at the demand of parties, to pronounce arbitral sentences on controversies which may arise between different railways; fourth, to give due form to suggestions for the modification of the present convention, and to propose to the treaty states the calling of a new conference; fifth, to facilitate between the different administrations financial operations necessitated by the international freight service, such as the collection of arrears, and the maintenance of stable credit relations among the various railways. The bureau, therefore, acts as agent for the liquidation of accounts due from one railway administration to another, and the method of demand and collection, as well as the responsibility of the respective states for such dues, are regulated in detail by the "règlement." The central office also edits an authoritative list of railway lines with international connections. In the special "règlement" for the central bureau the federal council of Switzerland is given authority to organize and supervise that institution. The expenses of the bureau are not to exceed one hundred thousand francs per year; they are borne by the contracting states in proportion to the length of their railway lines, which form part of the international service. The central office is authorized to issue a publication in French and German ("Zeitschrift für den internationalen Eisenbahntransport"; "Bulletin des transports internationaux par chemins de fer").

In agreement with the terms of the convention, the Swiss federal council has established a central bureau composed of a director, a vice director, a juristic and a technical secretary, and the necessary clerical personnel. The international office, like the similar bureaus of the postal and the telegraph union, is placed under the direct supervision of the Swiss Department of Post Offices and Railways, and the general regulations made for these bureaus are also made applicable in this case. The most striking function of the central office is that of pronouncing judgment in controversies between different railway administrations. According to the ordinance of the federal council, the court in such cases is composed of the director of the bureau and two arbitrators. The latter, as well as two substitutes, are appointed by the federal council. At the desire of the parties, or in cases of small importance, the director himself may act as judge without the assistance of other referees. The control of the steps of the arbitral procedure is in his hands and he also presides in the court. In case of disagreement between him and the arbitrators, he may call in the two substitutes, and should there be an equality of votes, his opinion is decisive. The services of this

tribunal are gratuitous as far as the parties to the controversy are concerned. The judicial function of the central office has been appealed to in numerous cases. Prominent experts have acted as arbitrators, perplexing controversies have been settled, and the arrangement has given general satisfaction.

The first conference for the revision of the convention took place in Paris in 1896. The modifications which it introduced were of a technical nature. After prolonged negotiations they finally went into effect in October, 1901. On account of these delays a long period elapsed between the first and second revision conferences, the latter of which did not meet until 1905. The feeling at this time was that, the convention having proved very acceptable in detail and successful in its operations, and its provisions having entered into the administrative practices of all the countries concerned, changes should be made only with great care. Future conferences should not consider matters which have not been carefully examined by the contracting parties before the conference, with a view to ascertaining the bearing of new propositions upon their respective systems and instructing their delegates accordingly. The conference concluded that it would be sufficient to have a general meeting once in five years instead of every three years as provided in the original treaty. Though important modifications were introduced in the technical details of the convention, they did not affect the organization of the union. The annual budget of the central office was increased to one hundred ten thousand francs, and arrangements were made for instituting a pensioning system for its officials and employees.

At this conference an effort was made to have the arbitral function of the central office extended to controversies between the railways and the general public. This change was, however, not sanctioned, though the conference declared that officials of the central bureau might personally act as arbitrators. But such judgments are not to be published in the official bulletin. Several other proposals failed of adoption. The Swiss federal council favored the extension of the union to the transportation of passengers and baggage. The Russian government desired to have the bureau instructed to work out and publish a complete statistical report on international railways, their traffic and operation. The latter proposition was not accepted because the extent and cost of the undertaking were not perfectly clear to the conference, while the former appeared to necessitate previous negotiations among the governments concerned. The idea of making an international

agreement concerning passenger traffic was however taken up again by the Swiss federal council, which, on February 9, 1909, resolved to submit to the states who are members of the international union a draft treaty concerning this subject. This convention is at the present time being considered by the member states. It includes international arrangements concerning the carriage of passengers from country to country, as well as the transport of baggage and of express parcels. Its adoption, which is considered a question of only a short time, will bring the entire railway traffic of the principal states of continental Europe within the realm of international agreement and regulation. The codification of the international railway law concerning freight has been in every way successful, facilitating commerce and simplifying the work of the various administrations concerned.

While the union under discussion comprises only states of continental Europe, there is an organization of a semipublic nature, the International Association of Railway Congresses, which includes a much larger number of nations. It was founded in 1885, for the purpose of establishing an interchange of experience in railway management, and its membership now consists of forty-eight governments and four hundred thirteen railway administrations. The seventh congress was held at Washington in 1905; the eighth, at Bern in 1910.

A convention was adopted by an international conference at Bern in 1882, for the purpose of securing uniformity in the technic of railway administration. Two subsequent conferences, in 1886 and in 1907, continued this work. Eleven continental European states have taken part in these conferences and ratified one or more of the conventions. The latter deal specifically with such subjects as the gauge of railways, the character of through carriages, and the construction and maintenance of rolling stock.

§ 6. **Automobile Conference.** — In October, 1909, there was held a conference, at which delegates from eighteen countries were present, for the purpose of working out a convention embodying international regulations for motor cars. The principal countries of Europe, as well as the United States, were represented by official delegates. The convention adopted lays down the conditions to be fulfilled by automobiles and by their drivers before international road certificates may be granted to them. It controls the issuance and validity of these certificates, and requires that each motor car shall carry, for purposes of identification, its number, as well as a large-sized letter establishing its nationality. Moreover, rules

with respect to the position of signposts on the public roads are laid down, and it is provided that in the meeting and passing of vehicles, the customs of the locality in which the driver finds himself must be strictly respected. This convention may be looked upon as an administrative arrangement. The delegates of some of the countries did not represent the department of foreign affairs but another administrative department of their government. While such delegates do not have a formal right to bind their country by signing the treaty, their participation will ordinarily assure the enforcement of the convention by the administrations which they represented. Arrangements of this kind have been entered into at other times, as, for instance, in the case of the South American agreement respecting dactyloscopy, which is discussed below. The convention was signed by the delegates of sixteen governments, and by April, 1910, it had been formally ratified by the following: France, Germany, Austria-Hungary, Belgium, Spain, Great Britain, Italy, and Monaco; so that it came into force May 1, 1910.

§ 7. **Navigation.**¹ — The methods and rules of navigation on the high seas are a matter in which naturally all seafaring nations are interested. It is, therefore, not surprising that signals and routes have been regulated to a certain extent by international coöperation. A signal code was first adopted by England and France in 1864. Other nations from time to time joined in accepting this code, which was given a thorough revision in 1899. At the present time forty states have adopted it. Through the use of flags of various sizes, forms, and colors, ships are enabled to communicate with each other, and thus a veritable international sign language has been created.

England and France also led the way in the adoption of conventional rules with respect to routes of navigation, as well as night and fog signals. These rules also have been remodeled from time to time, especially at the conference of Washington in 1889. They are at present accepted by thirty states, and though their observance has not been made obligatory on ships, they are as a matter of fact generally observed by navigators.²

¹ "Protocol and Proceedings, International Marine Conference, 1889", Washington, 1890; "Bulletin du Comité maritime international", Antwerp; "Revue internat. de droit marit.", Vol. XIX, pp. 800, 937; "Ann. de droit commere.", Vol. XVIII, p. 323; *Govare, P.*, in "Revue de droit international privé", Vol. I, p. 593; *Fromageot, H.*, "Projet de création d'un bureau international de la marine", Paris, 1902.

² [They are now to be found in U. S. Revised Statutes, § 4233, and in the British Merchant Shipping Act of 1894 (St. 57-58 Vict., c. 60); the first British Act was that of 1846 (St. 9-10 Vict., c. 100). See *Marsden*, "Collisions at Sea", 4th ed., 1897, p. 371. — Ed.]

The work of harmonizing and eventually of codifying international maritime law has been discussed at the annual conferences of the International Maritime Committee, which have taken place regularly since 1896. The committee is the central organ of national associations in twelve leading states; it has its seat in Antwerp and publishes a bulletin. Another body dealing with maritime interests is the International Association of the Marine, which was founded on French initiative. At its meeting at Lisbon in 1904, on which occasion the delegates of eight governments participated, the association voted for the establishment of an international maritime bureau. These private and semipublic endeavors have been supplemented by the work of an international conference on maritime law, convened at Brussels in 1905 on the invitation of the Belgian government. At this conference thirteen powers were represented and a convention project was adopted, covering the law of salvage and collision. This convention was further discussed and elaborated at a second conference held at Brussels in 1909.

There also exists a great semipublic union of navigation interests, the Permanent International Association of Navigation Congresses, which was founded in 1900. It numbers at present among its associates 25 governments and 1390 private organizations. Its annual budget is 75,000 francs, of which the states contributed 60,000 francs.

II. ECONOMIC INTERESTS

§ 8. **The Metric Union.**¹ — One of the most serious inconveniences of international commerce arises from a difference in the standards of weights and measures. The adoption of a uniform standard was therefore urged at an early date by the representatives of commerce and by scientific associations. In 1867 the international geodetic conference at Berlin pronounced in favor of the universal use of the metric system. It also suggested the creation of an international commission which should supervise the keeping and duplication of standard units of measure, in order to avoid a gradual divergence among the various national standards. In 1869 the French government created a metric commission ("Commission du mètre"), composed of French and foreign members, for the purpose of advancing unity of measurements. A conference called by this commission discussed the scientific

¹ *Bigourdan, G.*, "Le système métrique des poids et mesures", Paris, 1901; *Moynier, op. cit.*, p. 57; *Olivart, op. cit.*, Vol. II, p. 477.

methods required for assuring the stability of standards, and suggested the creation of an international bureau. For the purpose of carrying out these suggestions a diplomatic conference was convoked in Paris in 1875, which adopted a treaty on the subject. Under this treaty there was created a bureau of weights and measures, installed at Sèvres, near Paris. It is the function of this bureau to preserve the original standards of measurement, and, upon request, to furnish accurate copies to governments and scientific institutions. The bureau is under the supervision of a committee representing the states who are members of the union. From time to time there is held a general conference composed of delegates of the treaty states. The conference confines itself to the discussion of scientific methods for perfecting the accurate reproduction of standards of measurement. The bureau has become an important scientific center for metrological investigations. It is supported by contributions from the treaty states, and by fees received for reproductions of the prototype measures. The French government has dealt in a very liberal spirit with this institution. Not only are the buildings occupied by the bureau free from taxation, but the foreign members of the commission who reside at Paris are allowed a like exemption. Moreover, the bureau at Sèvres has always had some foreigners on its staff.

§ 9. **Patents, Trade-marks, and Copyrights.**¹—As a result of long-continued discussion on the part of persons and associations interested in the development of industrial inventions, the French government, in 1880, issued an invitation for a conference on the protection of industrial property, to be held at Paris. At a second conference held at the same place in 1883 there was adopted and signed by the representatives of eleven states a convention for the protection of patent rights and trade-marks. The purpose of the

¹ *Bergue, J.*, "Internat. Copyrights Union", L.Q.R., Vol. III, p. 14; *Briggs, Wm.*, "Internat. Copyright", London, 1906; *Darras, A.*, "Du droit des auteurs et des artistes dans les rapports internationaux", 1887; *Delzons*, in "Revue des deux mondes", Vol. XLVIII, p. 895; *Dubois, J.*, "De la révision en 1908 de la convention de Berne", "Journ. de droit international privé", Vol. XXXVI, p. 661; *Frey-Godet*, "La protection internationale des marques industriels", in "Zeitschrift für Völkerrecht und Bundesstaatsrecht", Vol. I, p. 329; *Olivart, op. cit.*, Vol. II, p. 402; *Poinsard, L.*, in "Annales des sciences politiques", Vol. XXV, p. 67; *Soldan*, "L'Union intern. pour la protection des œuvres littéraires et artistiques", 1887; "Annuaire de l'Association internationale pour la protection de la propriété industrielle"; "Recueil des conventions et traités concernant la propriété littéraire et artistique", published by the international bureau, Bern, 1903; "Paris Copyrights Congress", in "Nation", Vol. LXXI, p. 226; U. S. House of Repr. Doc. 1208, Sixtieth Congress; "International Copyright Union, Bulletin No. 13", Copyright Office, Washington, 1908.

union thus formed was not the complete unification of the respective laws of the member states, but rather the creation of administrative rules by which the citizens of one state would be permitted, without expensive formalities, to come under the protection of the patent and trade-mark laws of the other contracting states. In the words of the convention, "The subjects or citizens of each of the contracting states, as well as subjects and citizens of states which are not parties to the union, who are domiciled or have industrial or commercial establishments within the territory of any state of the union, shall enjoy in all the other states of the union the advantages which their respective laws accord at present or shall accord in future to their own nationals. Consequently they will have the same protection as the latter and the same legal recourse against any infringement of their rights, upon having complied with the formalities and conditions imposed upon nationals by the internal legislation of each state."

An administrative arrangement such as this might of course lead the way to a gradual assimilation of the various systems of national patent law themselves, although this would not be its immediate object. A central organ of the union, the international bureau of industrial property, was established at Bern. The functions of this office were at first confined entirely to correspondence, investigation, and publication. It was charged to bring together statistics and other useful information, to issue a periodical ("*La propriété industrielle*"), and to prepare preliminary studies for the conferences. The suggestion to make it an office for the registration of trade-marks and patents did not at first find favor. At the second revisionary conference, held at Madrid in 1891, the proposal for a trade-mark registry was repeated. Though this arrangement is not as yet acceptable to all the treaty states, it has been adopted by ten of them, who thus form a restricted union under the more general convention. Under this system the registration, at the international bureau, of a trade-mark already registered in one of the treaty states has the effect of giving protection in all the other contracting states without any further special registration in any of them. This method of procedure is a great simplification, and it materially reduces the expenses of industrial companies on account of trade-marks. The net income of this special service is distributed *pro rata* among the states of the restricted union. This arrangement, by which the international bureau becomes an administrative organ of the treaty states, is admirable for its directness. It does not involve any change in the national law, but

simply entitles the person or firm registering a trade-mark to whatever protection is given in the respective treaty state to this form of commercial property. Another restricted union was established at the Madrid conference among eight states, for the purpose of preventing fraudulent indications of the place of origin of merchandise.

The general union was strengthened in 1903 by the accession of the German Empire, which, up to that time, had held aloof. It comprises at the present time seventeen countries, including the United States.

The formation of the union for the protection of industrial property served as an encouragement to those men who desired to secure similar international privileges to works of art and literature. An international literary and artistic society had been formed in Paris in 1878 under the presidency of Victor Hugo. Its main purpose was to bring about a more complete protection of literary property. At a conference held at Bern, in 1883, the association worked out a general project of a convention for the international protection of copyrights. Thereupon the Swiss government was prevailed upon to call an official conference for the purpose of discussing and adopting a convention of this kind. Three diplomatic conferences were held in successive years, beginning in 1884, which resulted in the formation of the international union for the protection of literary and artistic property, and the adoption of the convention of 1886 on international copyright. The conditions existing before the creation of the union were in every way unsatisfactory. The systems of legislation of the different countries in matters of copyright were conflicting. Some of them granted no protection whatever to foreign authors; any privileges that had been secured by the latter were based on treaties between individual countries, which differed greatly from one another. This condition was much improved by the adoption of the Bern convention of 1886, though indeed it constituted only a first step in the evolution of a satisfactory universal law of copyright. Such a law is not at present feasible on account of the jealousy of individual states in behalf of their own legislation. The national laws were however affected in two ways. In the first place, the convention provided that authors who are citizens of one of the contracting countries shall have their works protected in all the others. This was effected without a change in the laws, by giving an author such protection abroad as the existing legislation in each country may accord to its citizens or subjects. But in addition to this, certain general principles

were laid down to which national legislation must conform. These latter rules constitute the beginning of a uniform system of copyright law, though they are of such a nature as still to leave a wide latitude for national discretion. The main principles, established in 1886, are as follows: Writings, music, works of fine art, and scientific designs are protected for a time which must not exceed the period of protection accorded either in the country of origin or in the country in which protection is sought. The right of translation is retained by the author for a period of ten years after the publication of the original. Dramatic works are protected against production in the same manner and for the same period as writings.

A conference for the purpose of revising the Act of Bern was held at Paris in 1896. It worked out and adopted an interpretative declaration and an additional act. The former settled a number of disputed points in connection with the first convention. The interpretations adopted were not satisfactory to Great Britain and were not ratified by that country. The additional act advanced the general work of international legislation and added to the principles established in 1886. This act was not adopted by Norway nor by Haiti. The principles established in the additional Act of Paris are as follows: Posthumous works are accorded protection. Authors who are not citizens of states in the union are personally protected when once their works have been published in, and receive the protection of, one of the member states. In other words, it is not the publisher, but the author, who is intended to have the benefit. Architectural works, as well as photographs, are accorded international rights.

In November, 1908, a second conference of revision was held at Berlin. It was a very important congress, attended by delegates of the fifteen members of the union, as well as of nineteen other nations who, though not members, had been invited by the German government. The latter included Argentina, the United States, and Russia. The conference adopted a complete code, intended to displace the former conventions. The most cardinal change made is that, while under the convention of 1886 foreign authors were protected according to the laws of their own country, it has now been established that the manner of protection abroad shall be governed by the laws of the country in which it is sought. This proposal was made by Germany on the ground that the problem of ascertaining the exact copyright law of other countries constitutes a great difficulty for the national judges. France supported the

proposal, with the reservation that the time of protection should still be governed by the laws of the country of the author, because otherwise the countries giving the longest protection would be at a disadvantage. The German proposal was adopted by the conference. Hereafter, therefore, each country will protect literary works according to its own law. It was further enacted that the normal time of protection should be that of France, extending to fifty years after the author's death; but it is also provided that, if this duration is not uniformly adopted by all the countries of the union, the period of copyright shall not exceed the time fixed by the country of origin. The system of 1908 approaches more closely the ideal of universal protection, and it admits foreigners directly to the privileges accorded under the local jurisdiction. The law of international copyright was further developed in the following manner: Architectural drawings are to be universally protected, whereas heretofore protection was made dependent upon the existence of national legislation. International rights are also given to choreographic pieces and pantomimes, to photographs, and to reproductions of music on mechanical instruments. An attempt was made to extend the privileges of the union to works of decorative art, or art applied to industry, but all that could be obtained was protection as far as the internal legislation of each country permits. The delegates of France, Germany, and Italy favored universal rights in behalf of industrial art, viewing the latter as an expression of creative thought in the same sense as applies to the fine arts. The proposal was opposed by England and Switzerland. The law relating to journalistic writings also was more definitely settled. Works of fiction appearing in periodicals are completely protected. Scientific, literary, artistic, and political articles may be reproduced unless the author has expressly reserved his right. In all cases the duty to give credit to the source is imposed. News items are not accorded any protection. The law, as here stated, had in its main features been settled by the first convention. The convention of Berlin completed the work and assimilated political articles to those of a literary character. It will be apparent from the above that, while the convention of Berlin grants protection according to the law of the country where rights are sought, it also continues the work begun before, of making the legislative norms in the various treaty states more and more harmonious and uniform.

Though the convention constitutes a universal code, it is rather a model to which future development will conform, than an act

whose integral acceptance on the part of all the members of the union is assured. The convention of Berlin declares, in Article 27: "The present convention shall replace, in the relations between the contracting states, the convention of Bern of September 9, 1886, including the additional article and the formal protocol of the same day, as well as the additional act and the interpretative declaration of May 4, 1896. The convention and acts above mentioned shall remain in force in the relations with the states which do not ratify the present convention. The states signatory to the present convention may, at the time of the exchange of ratifications, declare that they intend, upon such and such a point, still to remain bound by the provisions of the conventions to which they have previously subscribed." The convention was signed by the delegates of fifteen states. According to its terms, as seen above, it may be adopted with reservations, or even the former conventions may still remain in force in toto between individual members of the union. Nevertheless the treaty has already been ratified by nearly all the members, so that it may, before long, entirely displace the earlier conventions. The United States is not a member of this union.¹ The creation of a new convention by the union always gives an impetus to the making of more advanced treaties between individual nations. Thus, among such countries as France, Germany, Italy, and Belgium, a number of treaties have been made which develop their copyright law in the direction favored by the international union.

The union, in 1888, created a bureau which acts as a central organ of information and publishes a journal ("Le droit d'auteur"). In 1892 this office was united with the bureau of industrial property. The associated bureaus are under the control of the Swiss Department of Foreign Affairs. Their expenses are borne by the treaty states upon a basis of unit ratios. The relations of these bureaus to the governments and national administrations are, of course, not so direct as in the case of the telegraph, the postal, and the railway-freight bureaus, nor do they possess any arbitral functions; but their work in bringing together authoritative information upon the patent and copyright laws of the various nations has been of great value to the governments and to persons specially

¹ The manner in which the attitude of the United States impresses the world is shown by such statements as the following: "The United States, in fact, subordinates the primordial right of authors to the narrow interest of American printers and their employers. It may be said without exaggeration that this is a situation unworthy of a great people." — *Léon Poincard*.

interested. Movements for the reform of national legislation have derived their information from these international organs. The bureaux have a very small personnel, and have always stayed well within their modest budget, notwithstanding the volume and real importance of their published work.

*Union for the Publication of Customs Tariffs.*¹ — In 1890 an international bureau was created for the authoritative collection and publication of customs tariffs. It is situated at Brussels, and is under the control of the Belgian administration. Its duty is to supply, with the least delay possible, copies of laws and administrative ordinances referring to customs tariffs, and to cause the same to be published in its own periodical ("The International Customs Bulletin"). Forty-one states are parties to this arrangement; they divide among themselves the expenses of the bureau, which has an annual budget of 125,000 francs. In 1894 it was attempted, upon the initiative of the Swiss government, to establish a similar office for the publication of treaties. Sixteen governments were represented at a conference held at Bern, where the project of the Swiss government was discussed. On account of the lack of direct authorization on the part of several delegates, the conference did not take any action, but referred the project to the consideration of the various governments.

§ 10. **Protection of Labor.**² — The efforts which have been made for the purpose of securing agreements for the protection of labor are especially instructive. To an unusual degree private and state initiative have been combined and intermingled in the coöperation between public officials and private experts to bring about an international understanding. No field of action reveals so clearly the limitations of international arrangements and the difficulties in the way of their achievement, nor, on the other hand, shows so fully the possibilities inherent in them. The government of Switzerland

¹ "Acts of the Conference" of Brussels, 1888, and of Bern, 1894, in "Archives diplomatiques", Paris.

² A full bibliography is given by *F. Doehow* in "Zeitschrift für internationales Privat- und öffentliches Recht", Leipzig, 1906; *Francke, E.*, "Der internat. Arbeiterschutz," Dresden, 1903; Account of the Bern conference with procès-verbal, in "Archives diplomatiques", 1905, Vol. III, p. 271; "Bulletin de l'Office international du travail", since 1900; *Crick, D.*, "La législation internationale du travail", "Revue de droit international", 1905, p. 432; *Armand-Hahn, J. P.*, in "Annales des sciences politiques", Vol. XX, p. 156; *Jay, R.*, "La protection légale des travailleurs", Paris, 1904; "Schriften der internationalen Vereinigung für gesetzlichen Arbeiterschutz", Jena, 1901-1906; *Bauer*, "International Labor Office", "Economie Journal", 1903; *Raynaud, B.*, "Droit international ouvrier", Paris, 1906; *Pic*, in "Revue générale de droit international", 1907, p. 495; *Mahaim, E.*, in "Rev. écon. internat.", 1906; *Metin, A.*, "Les traités ouvriers", Paris, 1908.

deserves the credit of having made the first attempts to secure an international conference on labor legislation, after the matter had been repeatedly considered by a number of large international congresses, composed of delegates of labor associations and of other organized bodies. In 1889 the Swiss federal council addressed an invitation to fourteen European powers, requesting them to send delegates to a conference for the purpose of discussing certain definite topics concerning labor legislation. The suggestion was favorably received by the majority of the countries addressed, and the federal council consequently decided to send out formal invitations. But at this very time the German emperor issued two rescripts, in which he pronounced in favor of international action in labor matters. Correspondence followed between Germany and Switzerland, and the smaller country yielded to the German Empire the honor of calling the conference, which then assembled in Berlin, in March, 1890, with a representation of fifteen states. Three committees were appointed to consider (1) work in mines, (2) Sunday rest, (3) work of children, young workmen, and women. Though Switzerland proposed the conclusion of a binding convention and the creation of a central bureau, the conference did not favor the taking of such definite measures at that time. The only result of its work was the passage of resolutions embodying the opinion of the delegates on certain principles to be followed in labor legislation.

The conference thus having failed to produce tangible results in the form of a treaty, the propaganda for international labor protection was taken up with redoubled energy by private individuals and associations. In 1897 two labor-legislation congresses were held. The congress at Zürich was composed of the representatives of labor organizations. Although many opposing views were here represented, the delegates found it possible to unite upon a definite program of labor legislation. The congress which met in Brussels in the same year (international congress of labor legislation) was composed largely of publicists and economists. It confined itself entirely to discussion, not even passing resolutions. After the session, however, there was appointed informally a committee of three members for the purpose of finding means to carry on the work begun in the congress. The committee made certain arrangements with the Belgian government for the publication of an "Annuaire de la législation du travail", but the political conditions in Belgium were not favorable to a further pursuance of the purposes of this group of men. Other national committees were

however created, and the French committee eventually arranged for a conference, which was held at Paris during the exposition of 1900. This congress occupied itself with the question of a permanent organization. It was decided to form an international association, open to all who believed in protective labor legislation. The association was to be composed of national sections, each with its separate organization and autonomy. The governing board was to be a commission composed of two delegates from each section, together with the representatives of governments which desired to take part in the enterprise. An international labor office was established, whose mission it is to publish, in French, German, and English, periodic reports on labor legislation in all countries; to furnish information on labor laws to members of the association; to assist in the study of the legislative protection of labor, as well as in the creation of a systematic body of international labor statistics. The labor office is located at Basel, where it began work in May, 1901, and where the first general assembly of the association was held in September of the same year. It was composed of delegates representing the national sections as well as four governments. This assembly expressed the opinion that, while the association itself might carry on an active propaganda for labor legislation, the bureau should confine itself to an objective and impartial study of labor legislation for the purpose of furnishing an absolutely reliable basis of facts and statistics. As the first questions for discussion and eventual action the assembly selected, first, industrial night work of women; and, second, the regulation of unhealthy industries, especially those using white lead and white phosphorus.

The second general assembly was held at Cologne in 1902. On this occasion seven national sections and eight governments were represented. The assembly considered the organization and the finances of the central office as well as the two questions submitted by the previous conference. The international commission was instructed to take steps to induce the various governments to consider the suppression of these industrial dangers. The commission, at its subsequent meeting at Basel, decided to appeal to the Swiss federal council in order that an international conference might be called to frame a treaty on these matters. Early in 1905 invitations were sent out, and in May the official conference met at Bern. Over fifty delegates were present, representing all the governments of Europe, with the exception of Russia, Greece, Roumania, and Servia. The conference took up the discussion of the two questions which had been formulated and prepared by the assemblies of the

international association. Although the sessions occupied only eight days, the discussions were earnest and many different points of view were brought out. The absence of Japan interposed special obstacles to the adoption of a convention on the use of white phosphorus, a material extensively employed in the Japanese match industry. The convention which was finally adopted on this point provided that after January 1, 1911, the manufacture and sale of matches containing white phosphorus was to be forbidden. The Japanese government was to be invited to join in this treaty before December 31, 1907. Eleven out of the fifteen states voted in favor of this agreement. The conference also adopted a protocol regulating the hours of night work for women. These projects were transformed into definite conventions by a diplomatic conference which met in December, 1906.

A study of the widening extent of the white-phosphorus prohibition is particularly instructive in that it shows the reluctance of governments to place restrictions upon industry, and the possibilities which are afforded of accomplishing this through the plan of international coöperation in the enactment of labor laws. The agitation started in countries where the match industry was of a comparatively insignificant character, and where the evils due to the use of white phosphorus outweighed more strongly the advantages attendant upon encouraging the business. Such countries made no opposition to the restriction, and as early as 1874 Finland and Denmark had prohibitive legislation and had been quite successful in stamping out the disease of necrosis. Switzerland fell in line in 1879, the Netherlands in 1901, and Germany in 1903. By this latter period substitutes had been found, so that the use of white phosphorus was not so imperative; therefore the action of Denmark, Switzerland, and the Netherlands in prohibiting the importation of matches of this material, and the fact that Japan had become so successful a rival that other markets were practically excluded, made Germany not unwilling to prohibit the use of the poison and join the ranks of those who were agitating for this humanitarian legislation.

Now began a more active campaign that the restrictions which these countries had imposed on this industry might become world-wide, and thus might constitute no special hardship upon home industries. In France and Roumania the manufacture of matches was a state monopoly, so that it required but the actual substitution of potash for white phosphorus to accomplish the purpose, — a step taken in 1898. A special prohibitory law was there unnecessary.

The agitation for the extension of the prohibition resulted in its being placed on the program for discussion at the Bern conference of 1905; the convention adopted was promptly signed by Germany, Denmark, France, Italy, Luxemburg, the Netherlands, and Switzerland, and somewhat later by Spain, Belgium, Portugal, and Norway. Of the fourteen states represented in the conference, seven thus were ready to sign the treaty at once, but among these the prohibition was already in force in five states, while in the sixth the industry was almost negligible. Italy was the only country making any considerable concession, and here the convention has not as yet been ratified. By January, 1910, the convention had been ratified by France and most of her colonies, Germany, Denmark, Luxemburg, the Netherlands, Switzerland, Spain, Great Britain, and the Orange River Colony. Great Britain and Austria had previously conditioned their acceptance upon the adhesion of practically every country where the match industry was carried on, more especially of Japan. Great Britain pointed out that the signing of the treaty would necessitate (a) the postponement of other social legislation deemed more important in England, (b) depriving the people of their accustomed kind of matches and increasing the price, and (c) hampering the British export trade with restrictions not borne by competitors. The British contended that their system of restrictions had effectively stamped out necrosis, and that until other competing states were ready to take similar measures, they could not be expected to sign the convention. The effect of the treaty was, however, practically to exclude British matches from the European markets. This led to the passage of a parliamentary act in December, 1908, prohibiting the sale, manufacture, or importation of white-phosphorus matches. The exclusion of such matches from Australia, a field of export which the Japanese manufacturers were finding very profitable, will be a potent factor in inducing Japan to accede to the convention. So far, however, the burdens of the late war have rested so heavily upon that country that she has hesitated to hamper her industries by restrictions which are not imperatively demanded.

The extension of the white-phosphorus prohibition is of further interest as showing the obstacles which must be overcome before any prohibitory law can be made world-wide in its scope. Before nations can become signatory to treaties of this character they must have the social legislation developed to such a point that the proposed provision fits in readily with the established system. It is unreasonable to suppose that all countries that are thrown into

industrial competition have constructed their social legislation along similar lines. The physical and intellectual development of the working classes depends upon many factors, among which climate and race are prominent; each country must bear in mind its own peculiar needs in framing industrial legislation, and the matter of conforming to the laws of other countries is of secondary consideration. There are many industries, too, where there is competition with countries in which the regulation of labor is primitive, and where for years to come no hope can be entertained of adequate laws properly enforced.

International labor legislation implies that the contracting states are developing their social laws along parallel lines. This is not necessarily true. Several countries may be equally advanced in general labor legislation, but economic pressure and national interests may have operated so that one has neglected or postponed some one branch of legislation in which the others have made considerable progress. An international treaty covering such a branch may mean the sacrifice of world markets on the part of one country, with no similar loss on the part of other nations. Though Great Britain was backward in prohibiting the use of white phosphorus, the fact remains that in regard to factory and labor legislation in general she was far in advance of most of the signatory powers to the convention of 1906. But the method of combining those countries which can pass labor legislation at comparatively little cost, and then gradually enlarging the field by cutting off the markets of recalcitrants, results in an extension of labor prohibitions which nations working independently might be years in accomplishing. The limitation noted further suggests a method of work for which the international association of labor legislation is admirably fitted, and which it is in fact pursuing with marked success. By operating through the national sections in accordance with the program outlined by the bureau, pressure can be brought to bear upon the respective governments to induce them to legislate upon particular subjects; when this has reached a stage sufficiently advanced, the time is ripe for an international agreement.

In regard to the regulation of industries through international conventions, the United States occupies a position less advantageous than do the European countries, owing to the peculiar form of our governmental organization. The enactment of social legislation belongs in the main to the States rather than to the federal government, and constitutional prohibitions keep the States from entering into treaties with foreign countries, or even among themselves,

without the consent of Congress. The American section of the international association, especially in its operations through the State sections, is nevertheless accomplishing marked results in securing uniform laws in the various States, in conformity with the plans of the international association.

The extreme caution with which the governments have proceeded in regard to labor treaties is a characteristic mark of the jealousy which states feel in behalf of their legislative independence in such important matters. In the railway and telegraph service a unified administrative procedure for international traffic was forced upon the various governments by the circumstances of the case. That there is a great need for international regulation of labor laws is apparent from the interest which this subject has aroused. National advance in labor reform would in fact be checkmated were it not to be seconded by agreements of wider scope. Yet the governments have been very reluctant to commit themselves to any definite policy of uniformity in this matter, and the existing union has therefore remained semiprivate in its nature, for its main constituent elements are the national sections. The international labor office may also be called a semiprivate institution, though its work has been assisted in every way by the various public administrations which deal with labor affairs. The expenses of the office are borne partly by the contributions of national sections, but more largely by subscriptions of governments, Switzerland itself leading with a subscription of 12,000 francs a year, while the United States contributes only \$200.

In this connection we may also note the provisions of the Franco-Italian treaty of April 7, 1904. This treaty constitutes a very important attempt to have the privileges of national labor legislation extended to laborers who are sent in from another state. The convention refers especially to the gratuitous transfer of the savings accounts of laborers from one country to another, the admission of foreign laborers to the benefits of national labor insurance, and the extension to them in general of the protection afforded workingmen by the national law. Each power is obliged to make a full annual report on matters of public administration relating to labor, so that a guarantee may be afforded of the faithful carrying-out of the treaty provisions, through a mutual accountability.¹

On July 3, 1909, representatives of Great Britain and France

¹ Text in "Revue de droit international", 1904, p. 296; *Guyot, T.*, *ibid.*, p. 359; *Pic*, in "Revue générale de droit international", Vol. XI, p. 515.

signed a convention at Paris, providing for the admission by either country of laborers belonging to the other, to the benefits of state workmen's insurance against accidents.

§ 11. **The Sugar Convention.**¹ — For over forty years past, negotiations have from time to time been carried on among the powers for the purpose of putting restraints upon the policy of individual governments, by which they attempt to modify the commerce and production of sugar by means of a bounty system. Earlier treaties, such as those of 1864 and of 1877, proved inadequate to accomplish this purpose, because of the lack of compulsory provisions and the consequent failure of some of the contracting nations fully to live up to the agreement. After long-continued negotiations and a succession of conferences, a convention was finally concluded in Brussels in March, 1902, by which a number of European states formed a union for the purpose of doing away with sugar bounties and placing a fixed limit upon import duties (they are not to exceed the excise tax by more than six francs per quintal on refined, and five and a half francs on crude, sugar). The union included at the time of its formation nine states, and it now has fourteen members, including Russia, which came in under a special arrangement in 1907. A permanent organization is provided for in Article 7 of the treaty, which creates a standing commission charged with supervising the execution of the agreement. This commission is composed of delegates of the contracting states, and has its seat at Brussels. Its functions are as follows: (a) to determine whether in the contracting states there is accorded any direct or indirect bounty on the production or exportation of sugar; (b) to determine whether the contracting states, which are not exporters, continue in that special condition; (c) to determine the existence of bounties in nonsignatory states and the amount of the compensatory duty; (d) to give advisory decisions on questions in controversy; (e) to give due form to requests for admission to the union on the part of states which are not yet members; (f) to authorize the levy of an exceptional surcharge (not more than one franc per hundred kilograms) by any one of the contracting states against another, by whose sugar its markets are invaded to the injury of national production.

¹ Text of the treaty of 1902, in "Staats-Archiv", Vol. LXVII, p. 267; *Martino, G.*, "The Brussels Sugar Conference", "Ec. Jour.", 1904; *Taylor, B.*, "Sugar and the Convention", "Fortnightly", Vol. LXXVII, p. 633; *Lough, T. H.*, "The Sugar Convention of Brussels", "Contemp. Rev.", Vol. LXXXIII, p. 75; *Kauffmann*, "Weltzucker-industrie", 1903; *Politis, N.*, "L'Union internat. des sucres", 1904.

In general, it will be seen, the duties of the commission are confined to determining the existence of facts. On questions submitted, it makes an official report addressed to the Belgian government, to be communicated to the contracting states. But certain determinations of the commission have a direct validity, and form the basis of contingent treaty obligations on the part of the contracting states. This is the case with reference to the matters mentioned under (*b*) and (*c*) above. As soon as the commission shall determine that the states of Spain, Italy, and Sweden have begun to export sugar, these states, under the agreement, must conform their legislation to the dispositions of the convention. Whenever the commission ascertains the existence of bounties in nonsignatory states, the treaty powers are bound to levy a counter-vailing duty upon sugar imported from such sources. These determinations are made by a majority of the commission, each state being entitled to one vote, and they go into effect within two months of their date. An appeal, to be considered, must be lodged within eight days after the notification. It will then be decided within a month.

The commission is assisted by a permanent bureau located at Brussels, upon which is imposed the function of collecting, arranging, and publishing every kind of information and statistics concerning sugar legislation throughout the world. The expenses of the bureau and of the commission are borne by the contracting states, who also pay individually the expenses of their delegates. It is to be noted that these organs of the union do not correspond directly with the contracting states. The communications are all made through the Belgian government, which thus becomes the diplomatic agent of the union. Even information on laws and regulations concerning sugar, as well as statistical data, are not communicated directly to the commission, but through the Belgian government as an intermediary. All reports of the commission are likewise transmitted through the Belgian government, which also has the right of calling new conferences. The sugar commission is the only international organ which has a right, through its determinations and decisions, to cause a direct modification of the laws existing in the individual treaty states, within the dispositions of the convention. Though not given direct legislative power, it makes determinations of fact upon which changes in the laws of the individual states become obligatory under the treaty. Its function may be compared to that intrusted to the President of the United States in the reciprocity provisions of the McKinley and Dingley tariff laws.

In 1907 the life of the union was extended for a period of five years from September 1, 1908. It was also agreed that after this date Great Britain should be released from penalizing the importation of bounty-fed sugars, but such sugars when re-exported from Great Britain to any other contracting state would become liable to the compensatory duty.

§ 12. **Agriculture.**¹—Like other economic interests, those of agriculture extend in their relations beyond the political boundaries of states. The prosperity of the farmers of a nation is determined to a large extent by the conditions, legal and economic, in markets beyond the national boundary. Being more dispersed than the representatives of other pursuits, commercial or industrial, agricultural producers have been less successful in uniting for a defense of their common interests. Yet several private associations for the unification of various agricultural interests throughout the world were formed toward the end of the nineteenth century. A general international congress of agriculture has assembled periodically. It is composed of national sections and has for its organ a permanent international commission. Moreover, special organizations were founded to develop international relations among special groups of producers. Thus there was created a statistical union of sugar production and a congress of cotton producers and manufacturers. The latter established a permanent executive organization at its meeting in Zürich in 1904. The cotton congress, held the year after the international institute of agriculture had been created, expressed its sympathy with that undertaking, and the hope that it might soon include in its studies and operations matters relating to cotton culture. A German scientist, Dr. Ruhland, has organized at Freiburg an international office for the observation of grain prices and markets, which has done valuable work in providing accurate information on the supply and prices of grain, thereby enabling producers to take intelligent advantage of the conditions of the world's market.

These various tentative efforts and organizations, with many others not here mentioned, indicated that the time was ripe for the creation of a more general union for the advancement of agricul-

¹ *Della Volta, R.*, "The International Institute of Agriculture", "Rev. d'éco. pol.", Vol. XIX, p. 597; *Gidel*, "L'Inst. agricole internat.", "Annales des sciences politiques", Vol. XX, p. 630; *Pantalconi, M.*, in the "Giornale degli economisti", February, 1905; *Papafava, F.*, *ibid.*, September, 1905; *Henry, A.*, "L'organisation du commerce des blés", Brussels, 1900; *Luzzatti, L.*, "The International Institute of Agriculture", "North Am. Rev.", Vol. CLXXXII, p. 651; *Bellini, A.*, "L'Istituto internaz. d'agric.", Turin, 1906.

tural interests. The official initiative in this matter was taken by King Victor Emmanuel III, of Italy, to whom the idea of an international institute of agriculture had been suggested by Mr. David Lubin, an American. The king, on January 24, 1905, addressed to the president of the Italian council of ministers a letter in which he outlined the objects and purposes of such an institution in the following language :

The agricultural classes, generally the most numerous in the country, have indeed a great influence upon the destiny of nations ; but being without any organization or bonds of connection among themselves, they cannot effectively coöperate for the improvement and proper distribution of the different crops according to the demands of consumers, nor for the protection of their interests in the markets which, with regard to the most important products, constantly tend to become more nearly world-wide.

An international institute could therefore be of great utility if, free from all political aims, it engaged itself in the study of the conditions of agriculture in the different countries of the world, giving information from time to time upon the quantity and quality of crops, the manner of facilitating production, the least expensive and most rapid means of reaching the market, and the most equitable method of fixing prices. Such an institute, working in conjunction with the different national bureaus already created, would also be able to furnish accurate data upon the conditions of rural labor in different places, so as to be a useful and reliable guide for emigrants ; it could make arrangements for the common defense against diseases of plants and animals, which resist individual or partial efforts ; finally, it would exercise a beneficent influence in the development of rural coöperation, insurance, and agrarian credit.

On the basis of this royal initiative the Italian foreign office instructed its diplomatic agents to attempt to secure the coöperation of the powers for the purpose of creating an international institute. These instructions call attention to the disadvantages from which farmers now suffer through the lack of united action, which makes them a prey to speculators and to commercial and railway syndicates. But the instructions especially emphasize the support which the movement for world peace would receive through a development of the common interests of the agricultural class. It is therefore suggested that there be formed an institute composed of the delegates of various governments and of national associations of agriculture. The purpose of such an institute would include the organization of agricultural exchanges and labor offices ; the

organization of rural coöperation in sales, purchases, credit, and insurance; the defense against syndicates of intermediaries; and the preparatory study of legislative and administrative problems. Through the work of the institute the governments would be enabled to act in unison, upon the most reliable information. In order that these matters might be discussed, the Italian government extended an invitation to the powers to send delegates to a conference to meet at Rome. In preparation for this conference the ministries of foreign affairs and agriculture in Italy worked out a definite program which embodied these suggestions.

In the conference which met on May 28, 1905, thirty-eight European, American, Asiatic, and African governments were represented by official delegates. Although some of the most powerful states maintained an attitude of reserve, the general idea of an international institute of agriculture was received with favor. Opinions were however divided on the form that it should take. The thought of the Italian government evidently had been that there should be two component elements, possibly organized in two separate houses, one comprising the delegates of the governments, the other the representatives of agricultural associations. Thus only, it was believed, could the agricultural interests throughout the world become truly unified. The conference, however, confined its action to the establishment of an institution composed solely of the delegates of governments,—diplomats or agricultural experts. The international institute of agriculture, as organized by the conference, accordingly takes the following form: It is a public institution, consisting of a general assembly and a permanent commission, in both of which each treaty power is represented. The general assembly controls the work of the institute. It considers projects prepared by the permanent commission, fixes the budget, and makes suggestions to the contracting governments with respect to modifications of the organization. The quorum is fixed at two thirds of all the votes of the contracting states. The permanent commission carries out the directions of the assembly, and prepares projects for consideration by the latter. It is composed of one representative from each of the states, although one delegate may represent several governments.

The functions of the institute are as follows: (*a*) to collect, study, and publish statistical, technical, and economic information relative to agricultural and animal husbandry, agricultural markets, and prices; (*b*) to communicate the above information to governments interested; (*c*) to investigate the payment of rural labor;

(*d*) to give notice of new plant diseases which may appear in any part of the world, indicating the extent of territory affected, the course of the malady, and, if possible, efficacious remedies; (*e*) to study questions relative to agricultural coöperation, insurance, and credit; (*f*) to present, for the approbation of governments, measures for the protection of the common interests of agriculturalists and for the betterment of their condition, taking account of all means of information, such as resolutions of international and other agricultural congresses, agricultural societies, academies, and other scientific bodies.

The states belonging to the institute are divided into five groups, each state being free to choose for itself to which group it will belong. Members of the first group have five votes in the assembly and contribute sixteen units to the income of the institute; in the second group they have four votes and contribute eight units; and so on down to the fifth, where each member has one vote and contributes one unit. The unit is not to exceed 2500 francs a year. The king of Italy supported the foundation of the institute by making over to it the revenues of certain valuable crown domains.

The organization determined on by the diplomatic conference at Rome was far from meeting the desires and aspirations of the men who were most interested in the movement for an international union of agriculture. Not only is the institute a purely governmental institution, but its functions are practically confined to the collection of information and the suggestion of projects for treaties and legislative measures. Yet it could hardly be expected that the governments would immediately consent to the establishment of an organ with direct administrative functions, such as, for instance, an international coöperative union of agricultural credit. On the basis of the organization as effected, it will be possible to centralize efforts in behalf of the agricultural interests and to secure a gradual amelioration of agricultural conditions. The institute, as its organic law indicates, will hold itself ready to coöperate with national and international organizations representing private initiative, such as the international congress of agriculture mentioned above. In Italy there was organized in 1905 a special office for the representation of agricultural societies and coöperative organizations, which is to mediate between the latter and the international institute.

Several matters connected with agriculture, which have heretofore been regulated by separate treaties, will now probably be drawn within the scope of the agricultural institute. In 1878 there

was formed in Bern a union comprising eleven European states, for preventing the introduction and spread of phylloxera. In March, 1902, a convention was concluded at Paris for the protection of useful birds; this has been ratified by eleven states. The treaty governments engage themselves to propose to their respective legislatures measures for the protection of birds which destroy insects noxious to agriculture. In this connection we may also mention the union for the protection of large African game, concluded in London, May 19, 1900, among the powers which have colonies in central Africa.

§ 13. **Insurance.**¹ — Though there has not as yet been created in the interests of insurance an international administrative organization, yet a number of governments have regularly participated in the meetings of international associations dealing with insurance problems. Most prominent among these is the international congress of actuarial science. Not only have the meetings of this congress usually been held under government patronage, and under the presidency of some important statesmen (in 1903, Secretary Cortelyou, in New York), but many governments have been represented by official delegates, and the deliberations of the congress have dealt to a large extent with administrative and legal, as distinct from technical and mathematical, subjects. The congress of 1906 was held in Berlin in conjunction with the fourth international congress of insurance medicine. Sixteen governments were represented by official delegates, and five of the thirteen topics of discussion dealt entirely with administrative and legal questions. The congress has an official organ in the permanent committee for insurance congresses at Brussels. Aside from the governments, national actuarial societies and similar associations are represented in its organization.

The international congress of protection against fire, which is a more purely private organization, resolved, in London in 1903, to establish experiment stations, an international expert commission, and a central statistical bureau. International congresses of labor insurance have been held repeatedly (the eighth congress met at Rome in 1906) and have received financial assistance from various European states.

¹ *Emminghaus*, in "Zeitschrift f. d. Versicherungs-Wissenschaft", Vol. VII, p. 9; "Reports, Memoirs, and Proceedings of the Fifth International Congress of Actuaries," Berlin, 1906.

III. SANITATION AND PRISON REFORM

§ 14. **The International Prison Congress.**¹ — Congresses for the purpose of the discussion of penitentiary administration and reform have been held at irregular intervals from 1846 on. At the congress of 1872, under the leadership of the United States, steps were taken to secure a permanent organization. Since 1880 congresses have been held every five years, the place of the last meeting being Washington (1910). At the congress at Budapest in 1905 twenty-eight nations were represented. The scope of the work of the congress is not apparent from its designation in English. This is an imperfect translation of "pénitentiaire", a term which includes the consideration of all that relates to the moral and physical amelioration of prisoners as well as to the prevention of crime. The executive work of preparing for the congresses is performed by the international penitentiary commission composed of one delegate from each country. The commission meets regularly every two years, and is composed of four sections, for the consideration of prison administration, penal law, prevention of crime, and juvenile delinquencies. The secretariate of the commission is situated at Bern. Some time previous to the meeting of the congress, series of questions prepared by experts are sent out to the various countries represented. They are submitted to careful review by adepts, and reports upon them are returned to the secretariate. All these reports are then edited and published in French, to be distributed among all the delegates appointed to the congress, in time for them to give these matters careful study. In this manner the discussions avoid all preliminary misunderstandings as to definitions and points at issue, and the meetings of the congress are usually very fruitful in the formation of definite opinions on matters connected with practical prison administration. The congress and the commission have no power to bind the respective governments by treaty; their purpose is primarily the exchange of expert opinion and knowledge, for the development of the science of penitentiary administration.

§ 15. **International Sanitation.**² — International defensive action against invasion by epidemics was first urged by the French

¹ "Bulletin de la Commission pénitentiaire internationale", Brussels and Bern; *Jaspar, H.*, in "Revue de droit international", 1901, p. 448; *National Prison Association*, "Proceedings", 1905, p. 227. "Charities", Vol. XV, p. 116; "Les congrès pénitentiaires internat.", "Revue pénitentiaire", 1905, p. 653; *Le Poittevin, A.*, in "Revue de droit international privé", Vol. I, p. 90; *Barrows, S. J.*, "The International Prison Congress", *Sen. Doc. 462*, Sixtieth Congress, first session, 1908.

² Text of the treaty of Venice, 1897, in "Staats-Archiv", Vol. LXI,

government, which in 1851 called a sanitary conference to meet in Paris; this was followed by a second meeting in 1859. The terrible epidemic of cholera of 1865 caused the holding of a third congress at Constantinople. Other conferences have followed at short intervals. Although from the first these had a diplomatic character in that they were attended by the representatives of governments, they were primarily scientific in their aims, confining themselves to discussions and resolutions rather than to elaborating treaties. Ultimately, however, more formal action was taken, and at Venice in 1892 the first general treaty for protection against cholera was framed. Every conference since then has added to the diplomatic work, that of Venice in 1897 and that of Paris in 1903 being especially important.

At the latter conference it was voted to establish an international sanitary office to be situated at Paris. Such a bureau had first been suggested at the international congress of hygiene at Brussels in 1897. At the Paris sanitary conference the president of the French delegation introduced the subject by calling for the creation of a "union de santé incarnée dans une autorité internationale fortement constituée." The functions bestowed upon the bureau according to this first proposal are, however, not executive, but only informational. The office is to collect information on the progress of infectious diseases, being assisted by the sanitary authorities of the treaty states. The results of the work of the bureau are to be communicated to the various governments and published. The establishment of the bureau was supported by all powers represented, but was accepted with certain reservations by Austria, Great Britain, and Germany. The sixth sanitary conference, which met at Rome in 1907, drew up a formal convention which contains detailed arrangements for the new institution. The international office of public hygiene is located at Paris, and is under the control of a commission composed of delegates from all the member states. Its main object is "to collect and bring to the knowledge of the participating states facts and documents of a general character concerning public health and especially regard-

p. 261; "La conférence de Paris", 1903, in "Revue générale de droit international", Vol. XI, p. 199; *Houet*, "Conférence int. sanitaire", in "Rev. int. de droit marit.", Vol. XIX, pp. 805-870; *Loutfi, Z.*, "La politique sanitaire internat.", 1906; *Monod, H.*, in "Rev. d'administration", March, 1904; *Rapmund, O.*, "Das öffentliche Gesundheitswesen", Leipzig, 1901, p. 126; "8^e Congrès internat. d'hygiène et de démographie", Budapest, 1895; *Huot*, in the "Rev. int. de droit marit.", Vol. XIX, p. 803; "Procès-verbaux", Paris Conference, 1903, Paris, 1904; Text of Convention of 1903, transl. by *Thomson*, London, 1904.

ing infectious diseases, notably cholera, the plague, and yellow fever, as well as the measures taken to check these diseases." The number of votes allowed each treaty state, in the government of the office, is determined by, and is inversely proportional to, the number of the class to which it belongs as regards its participation in the expenses. The budget is fixed at 150,000 francs per year. The convention went into effect in 1908, after having been ratified by nine powers, including the United States. Other governments have since given their adherence.

The execution of the treaties of the sanitary union, with respect to prophylactic measures to be taken in Turkey and Egypt, is supervised by two commissions, the sanitary councils of Constantinople and of Alexandria. The "*conseil supérieur de santé*" of Constantinople was created by arrangement between the Sultan and the maritime powers having relations with Turkey, as early as 1838. It was natural that the functions of surveillance created by the treaty of Venice in 1892 and by later treaties should be intrusted to this organ. The council is composed of seventeen voting delegates, four being appointed by Turkey, the others by the foreign treaty powers. Decisions of the council are taken by majority vote, and are directly executory. The Turkish minister of foreign affairs acts as president of the council, and the representation of the foreign powers is arranged through their respective legations at Constantinople. The council supervises the quarantine service at Turkish ports on the Persian Gulf and on the Red Sea, as well as along the Persian and Russian boundaries. The expenses of the council are met by fees imposed for quarantine services, which are in turn regulated by a "*mixed commission on the sanitary tariff*", composed of representatives of the various powers. The Turkish government also contributes toward the expenses.

The "*conseil sanitaire, maritime et quarantenaire d'Égypte*" at Alexandria was created in 1881. It is composed of the representatives of fourteen treaty powers and two representatives of Egypt. The presidency is accorded to the representative of Great Britain. The council has regular monthly meetings, and controls the Egyptian quarantine stations on the Red Sea, the Suez Canal, and the mouth of the Nile. A similar sanitary council exists at Tangier. It was created in 1840, and has also been brought into relation with the general sanitary union. The conventions framed by the various sanitary conferences control the treatment of suspected ships and passengers from countries subject to epidemics, in all the ports of the treaty powers. The conclusion of general treaties on this

matter was for a long time resisted by Great Britain, because of fears in behalf of her shipping interests. The continued danger of infection from oriental countries, however, finally forced the European nations to unite in self-defense. The sanitary conferences, while fitted out with diplomatic attributes, are still largely concerned with scientific questions. The provisions of their treaties must frequently be modified in accordance with the latest determinations of science with respect to the period of incubation and the most efficient means for preventing the transmission of disease.

The international congress of hygiene and demography has a purely scientific character. It is composed of the official representatives of most of the civilized countries, together with delegates of scientific bodies and of local councils of public health. The congress has a permanent commission with offices at Brussels. Another similar organization, in which also governments officially interest themselves, is the international congress of school hygiene. Two government conferences have been held for the scientific discussion of leprosy (Berlin, 1897; Bergen, 1909); and the first international congress on the sleeping sickness was held at London in 1907. Six countries participated in the latter through official delegations.¹

*Pan-American Sanitary Union.*²—The second Pan-American conference, which met at Mexico in 1902, passed a resolution concerning international sanitary police. Among other things it recommended that the "American governments shall coöperate with each other toward securing and maintaining efficient and modern sanitary conditions in all their respective ports and territories, to the end that quarantine restrictions may be reduced to a minimum and finally abolished." The conference also provided for the calling of a sanitary congress at Washington and the establishment of an international sanitary bureau at the same place. The latter was to be composed of a permanent executive board of not less than five members, to be elected by the congress. These resolutions were carried out, the bureau was established in Washington, and four congresses have been held to date. The second of these, which met in October, 1905, worked out a treaty project concerning the prevention of such epidemics as cholera, the plague, and yellow fever. This treaty has been ratified by fourteen American powers, including the United States, Mexico, Peru, Venezuela,

¹ See Brit. Parl. papers, 1907, Cd. 3778, and 1909, Cd. 4916.

² "Proceedings of the International Sanitary Conferences", Washington, 1902-1910; "Report of the Fourth Conference", in "Bulletin of the American Republics", April, 1910.

Brazil, and Colombia. The third Pan-American conference, held at Rio de Janeiro in 1906, passed a further resolution on sanitary police. After recommending the general acceptance of the convention of Washington, it urged the adoption of measures tending to assure the adequate sanitation of cities and especially of ports. It had been pointed out that in order to be thorough, international sanitary police must not confine its attention to quarantine and to a definition of quarantinable diseases, but must advance to the taking up of the effective sanitation in centers from which disease may spread. The Pan-American conference further resolved on the establishment, in the city of Montevideo, of a center of sanitary information, which shall supply to the already existing international sanitary bureau at Washington the elements necessary for a successful carrying-out of its work. Coöperation between the bureau of Washington and that established at Paris by the international sanitary union was also provided for, with a view to obtaining mutual information. The fourth international sanitary conference was held at San José in Costa Rica in 1909. The advance made in sanitation throughout America as a result of the efforts of the union was reviewed at this time, and the great benefits obtained through this work were brought out in an impressive manner. The conference adopted further resolutions embodying the results of the best experience in dealing with the plague, cholera, and yellow fever, and recommending specific measures for uniformity in mutual protection.

§ 16. **The International Opium Commission.**¹ — In view of the fact that the opium evil in China and other countries cannot be effectively combated except through coöperation among different nations, it was proposed by the American government in September, 1906, that a conference be held by a commission composed of delegates of the different powers. The commission met at Shanghai in February, 1909, upon which occasion thirteen nations were represented. The program had been prepared and was communicated to the countries concerned in advance. Each government had been invited to submit a report to be laid before the commission at Shanghai. After receiving reports and discussing the questions before it, the commission adopted a set of resolutions calling for legislation within the countries represented, against the manufac-

¹ "Proceedings of the International Opium Commission", Shanghai, 1909; Treaties and documents concerning opium in "Am. Jour. of Internat. Law", Supplement, July, 1909; *Hamilton Wright*, "International Opium Commission", "Am. Jour. of Internat. Law", July and October, 1909.

ture and distribution of opium for other than medicinal purposes. On September 1, 1909, the American Secretary of State proposed to the interested powers that a conference be called, to meet at The Hague, for the purpose of framing a convention concerning opium, which would include the recommendations made by the opium commission and other matters connected therewith.

§ 17. **The Geneva Convention.**¹—The care of the wounded during wars has become the subject of a special international agreement, the Geneva convention of 1864. This regulates the treatment of disabled soldiers and neutralizes the sanitary and hospital services during military operations. This convention made possible the work of the Red Cross societies, which have been established in practically all civilized countries. These associations are organized on a private basis, though their work is essentially of a public nature, for which reason they must necessarily be in close touch with the administration of military affairs. The societies form a universal union, which has its administrative offices at Geneva, where it periodically holds conventions. The international committee of the Red Cross at Geneva acts as a central organ of communication between the national branches. Repeated attempts have been made to amend the convention of 1864, and finally, in 1906, a new convention was adopted at Geneva. The latter defines with greater precision the persons and services protected by the convention, but avoids the term “neutral” and gives, in some respects, greater rights of control to belligerents. The emblem of the red cross is henceforth to be protected against unauthorized and commercial uses.

IV. POLICE POWERS

§ 18. **Fisheries Police.**²—The fishing industry in the North Sea, being carried on by fishermen of various nationalities, has required international legislation and protection. A treaty was concluded in 1882 between the six powers most directly interested. Under this treaty any commissioned ship of a signatory power may, in certain enumerated cases, intervene and arrest any fishing vessel

¹ “Bulletin international des sociétés de la croix rouge”, Geneva; *Moynier*, “Notions essentielles sur la croix rouge”, Geneva, 1896; *Meurer*, in “Zeitschrift für Völkerrecht und Bundesstaatsrecht”, Vol. I, p. 521; “Annuaire de la vie internationale”, 1908-1909, p. 421; *Fauchille and Politis*, “Manuel de la croix rouge”, 1908.

² Treaty of May 6, 1882, and of November 16, 1887, in “Archives diplomatiques”; *Père de Cardaillac de St. Paul*, “Étude de droit international sur la pêche”, Toulouse, 1903.

belonging to a subject of a treaty power. The delicts for which such an arrest may be made are enumerated in the treaty, and the delinquent vessel must be delivered up to the authorities of its own country. This arrangement is supplemented by the convention of November 16, 1887, concluded at The Hague among the same powers, with the exception of France. Under this convention the surveillance and control of floating "cabarets," or liquor shops, is provided for. The policing is carried on by the commissioned ships of the treaty powers, which have the same rights of arrest in this matter as they were given under the treaty of 1882.

§ 19. **Protection of Submarine Cables.**¹—The international status of submarine telegraphs led to much discussion when these instruments of communication were first put into use. In 1869 the government of the United States suggested the holding of a conference for working out a treaty project on the neutralization and protection of cables. The Franco-Prussian War caused the postponement of such action, although there was continued diplomatic and scientific discussion of the international law aspects of marine telegraphy. In 1879 the Institute of International Law took up this matter and came to the conclusion that the first object to be achieved was to protect submarine cables against wanton or careless destruction by means of an international agreement for the arrest of delinquents on the high seas. In 1881, on the basis of a resolution of the international congress of electricians, the French government issued invitations for a diplomatic conference, which met in Paris during the following year. Thirty-three states, as well as the international telegraph bureau of Bern, were represented, either by diplomatic or expert delegates. The delegates of the United States, the power which had originally taken the initiative, declined to take an active part in the proceedings, pleading lack of instructions from their government. The result of the deliberations of this conference was the drafting of a convention which was later ratified by the diplomatic representatives of the powers at Paris (March 14, 1884). Under this treaty certain precautions for the protection of cables are made obligatory upon fishermen and navigators. The commissioned ships of any signatory power may arrest ships suspected of having willfully or negligently injured cables. The arrest is made for the purpose of ascertaining from the ship's papers all necessary data with respect to it. An authen-

¹ *Landois*, "Völkerrechtl. Schutz d. submarinen Telegraphenkabel", Greifswald, 1894; *Renault, L.*, on protection of cables, in "Revue de droit international", Vol. XV, p. 17; "Conf. internat. pour la protection des cables", 1882, 1886, Paris, Impr. Nat.

tic written minute ("procès verbal") is made out on the basis of the facts thus ascertained and of the injuries observed. This document has legal force before the national tribunals of the delinquent, to which jurisdiction for the trial of such cases is reserved.

§ 20. **African Slave Trade and Liquor Traffic.**¹ — Agreements for the suppression of the slave trade were made between Great Britain and France in the years 1833 and 1841. In the latter treaty some additional states joined. The congress of Berlin in 1885 took up the question again and determined in principle upon the more complete international organization of the preventive system. The Brussels conference of 1890 finally regulated the matter through a convention or general act in which both slave trade and African slavery itself were made subject to strict international regulation. An office was established at Zanzibar ("bureau international maritime de la traite") for the purpose of superintending the enforcement of the general act. The five powers which primarily assumed the preventive operations on sea are represented in this bureau. A second bureau was established at Brussels for the purpose of collecting information and publishing documents and statistics with respect to the slave trade. Eighteen states are members of this union. The Brussels general act of 1890 also regulates the sale of liquors in the central belt of Africa (between twenty degrees north and twenty-two degrees south). In regions where the natives have not yet become accustomed to the use of liquors the traffic is entirely forbidden. For other parts a high minimum excise duty is fixed by the treaty. The bureau at Brussels is to act as an intermediary between the treaty powers for the exchange of information concerning the liquor traffic in their respective African possessions. Conferences were held in 1899, in 1906, and in 1908, at which the rules of 1890 were revised and amended. The traffic in firearms in Africa has been regulated in a similar manner by international action.

§ 21. **The White-Slave Trade.**² — The nefarious traffic known as the white-slave trade has for a considerable time operated on an international basis. The persons engaged in it have received

¹ Brussels General Act, in "Archives diplomatiques", Vol. XXXV, p. 206; "Documents relatifs à la repression de la traite", Brussels, annually; "Recueil du bureau de Bruxelles." "Actes de la conf. de 1906", Brussels.

² "Int. Conf. for the Repr. of White Slavery", 1902, in "Archives diplomatiques", Vol. LXXVII, pp. 154-263; *Appleton, P.*, "La traite des blanches", Paris, 1903; "Reports of the International Congress for the Repression of White Slave Trade" (London, 1899; Frankfurt, 1903; Paris, 1906); *Renault, L.*, "La traite des blanches", in "Revue générale

protection from the fact that their transactions were not confined to one single national territory, but that acts apparently innocent and legitimate were followed by a consummation in another state which rendered the entirety of the act criminal. Without international agreement as to the responsibility in such cases, it would often be impossible to punish guilty persons because the acts committed in any one particular state might not amount to a completed crime. It was, moreover, necessary that the police administrations of the different states should support the efforts of each other by promptly giving information and in other ways, so that the execution of criminal designs might be frustrated. The matter of coming to an understanding was first taken up by private international congresses. The principal one of these organizations is the international union for the repression of the white-slave trade, which was founded in London in 1899 and has its central office in that city. The successive congresses of this union have worked out definite principles and methods for the purpose of preventing the traffic in question. Through its initiative the French government was prevailed upon to call a conference of the powers, which met in Paris in July, 1902. Fifteen states were presented, including Brazil on the part of America. The conference elaborated projects for a convention and for an administrative arrangement. The former includes such modifications of the principles of criminal law as would be necessary to make the suppression of the traffic effective. Certain divergencies as to the age of majority, the transmission of rogatory commissions, and other matters delayed the ratification of this treaty; but the Paris conference of April 18, 1910, resolved these difficulties in a satisfactory manner, and the convention has been ratified by a number of states.

The "arrangement" has in view the adoption of methods of suppression which can be instituted, without legislative action, by mere administrative ordinances in the various states. This was ratified by a diplomatic conference assembled in Paris in May, 1904, and it has been accepted by sixteen powers, including the United States.¹

de droit international", Vol. IX, p. 497; *Rehm*, in "Zeitschrift für Völkerrecht und Bundesstaatsrecht", Vol. 1, p. 446; *Mayr, G. v.*, on the Paris congress on white slavery, 1906, in "Beilage zur Allgemeinen Zeitung", Munich, February 5-6, 1907; *Teutsch, J.*, on the congress of 1906, in "Revue pénitentiaire", Vol. XXXI, pp. 84-104; *Bérenger, R.*, "La traite des blanches", in "Revue de deux mondes", July, 1910; "Deuxième conférence internat., correspondance, etc.", "Archives diplomatiques", Vol. CXV, pp. 45-200.

¹ The legislative and administrative autonomy of the individual States of the American Union places great difficulties in the way of effective coöperation on our part.

It further provides that each treaty government is to create or designate a special bureau to collect all specific information about attempts to engage women for immoral purposes in foreign countries. Such bureau is to have the right of immediate communication with the similar bureaus in other states. The governments are to institute a special service of surveillance in railway stations and ports for the purpose of discovering attempts to carry on this illegal traffic. In cases where mere suspicion exists, such suspicion shall nevertheless be communicated to the authorities at the point of destination of the suspected persons. The repatriation of victims of the traffic is also provided for. The French government is made the agent of the union for the purpose of carrying on the diplomatic negotiations for the admission of new members. The London bureau will act as a central organ for purposes of communication, while in the individual countries certain police authorities, as, for instance, the police presidency of Berlin, have been designated to act as national bureaus.

The Paris conference of April, 1910, extended the methods of international police coöperation to the suppression of immoral writings and objects. The publication or manufacture of, and the commerce in, such things is to be generally forbidden; infractions may be tried in any country where the delict or some of its elements has transpired. By a "project of arrangement" each state binds itself to designate some authority to give information to the agents of the other governments respecting such cases. Fifteen powers were represented at this conference.

§ 22. **The South American Police Convention.**¹ — The Latin-American scientific congress, which met at Rio de Janeiro in 1905, after a discussion of the best means of interchanging information for identifying criminals, passed resolutions calling for the holding of an American police congress for the purpose of making an agreement upon this point. As a result a police conference met at the city of Buenos Aires in 1905. It included delegates of the police administrations of the province, as well as the city of Buenos Aires, of the city of Rio de Janeiro, of Santiago, and of Montevideo. It was therefore purely an administrative conference, representing not the national governments in their entirety but only the police administration of the capital cities. The convention adopted was an arrangement for the coöperation between these administrations

¹ "Conferencia internacional de policia, convento celebrado", Buenos Aires, 1905; *Almandos, L. R.*, "Dactiloscopia Argentina", La Plata, 1909.

for their mutual assistance. Paraguay later also gave its adherence. The convention provides for the interchange of data for the purpose of identifying criminals and suspicious characters. For purposes of identification the Argentinian system of dactyloscopy, together with a system of morphological description, was adopted, to be used in common by all the administrations. The treaty further provides for the exchange of information concerning the movements of suspicious characters.

CHAPTER XIII

THE HARMONIZATION OF THE RULES FOR CONFLICT
OF LAWS

PART I. THE RESULTS OF THE HAGUE CONFERENCES

BY FRIEDRICH MEILI¹

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| § 1. The Hague Conferences of 1893, 1894, 1900, 1904. | Guardianship of Minors, and the Draft Convention upon Interdiction. |
| (I) <i>The Work Accomplished by the Conferences.</i> | § 7. Same: The Treaty upon Succession. |
| § 2. A. International Civil Procedure. | § 8. C. International Law of Bankruptcy. |
| § 3. B. International Private Law. | (II) <i>The Future Possibilities of Accomplishment.</i> |
| § 4. Same: The Convention upon Marriage. | § 9. The Prospects of Anglo-American Coöperation. |
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| § 6. Same: The Treaty upon the | |

§ 1. **The Hague Conferences of 1893, 1894, 1900, and 1904.** — Almost the whole of Europe assembled at The Hague in 1893 and 1894 at the invitation of the Government of the Netherlands; diplomats and international jurists represented their governments at the Conferences. At the First Conference the following countries were represented :

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| 1. The German Empire. | 8. Luxemburg. |
| 2. Austro-Hungary. | 9. Netherlands. |
| 3. Belgium. | 10. Portugal. |
| 4. Denmark. | 11. Roumania. |
| 5. Spain. | 12. Russia. |
| 6. France. | 13. Switzerland. |
| 7. Italy. | |

¹ [Late Professor of Private International Law and of Comparative Law at the University of Zürich, Member of the Institute of International Law, Delegate of the Swiss Republic to the Hague Conferences and to the Hague Court of Arbitration, etc., etc. The death of the author in 1914 removed Switzerland's most distinguished international publicist; an extended account of his writings and other activities is given in a Note in the "Journal of the American Bar Association", 1915, I, 213.

The present Chapter is a reprint (with slight omissions) of his paper read in person at the Universal Congress of Lawyers and Jurists at the Louisiana Purchase World's Exposition of 1904 at St. Louis. — Ed.]

At the Second Conference, Sweden and Norway also participated. Servia did not reply to the invitation, and Greece excused its non-appearance. Great Britain referred to the peculiar nature of English law as the reason for not sending delegates. In 1900 all the countries named again took part. In 1904 (May and June), a delegate appeared representing the Empire of Japan; this fact was a surprise to certain of the delegates. The United States of America, as also South America, have, up to the present, taken no part whatever in the Conferences.

Jurists have been occupied for centuries with the question as to what principles shall apply when two or more systems of law appear to be applicable to the solving of a dispute of law; the problem arises frequently by reason of the great mutual intercourse between subjects of the different states. Historically, the question dates back as far as early mediæval Europe, and found special treatment in the Italian cities. Among others, the question was taken up by Bartolus (1314-1355 or 1357) whom Phillimore, with a slight exaggeration, denotes in his "Commentaries upon International Law" (IV, 3d ed., p. 19) as "the fountain of private international jurisprudence."¹ Later it was the so-called Dutch school of the seventeenth century which developed the theory of the "*collisio statutorum*." Its principal proposition was that basically no state was obliged to take cognizance of foreign private law, and did so only out of courtesy. English and Scotch jurists derived their education largely from the Netherlands in the seventeenth century, and it was they who established this doctrine in England. As the English colonists took the English common law with them to America (*cf.* 1 Kent's "Commentaries on American Law", p. 343), the whole complex of views upon international private law went over to this country as a kind of article of export.

There is no doubt that the principal English and American authors consider the so-called "*comitas gentium*" as the basis of private international law. Kent and Story, Phillimore (Vol. IV is entitled "*Private International Law or Comity*") and Twiss ("*Law of Nations*", 1, p. 160) have expressed this view. It is true Wharton ("*Conflict of Laws*", § 1) opposes this, and Lorimer

¹ I refer in this connection to my handbook (Zürich, 1902): "*Das internationale Civil und Handelsrecht auf Grund der Theorie, Gesetzgebung und Praxis.*" It may be of interest to the legal profession in general to know that Mr. *Arthur K. Kuhn*, a member of the New York bar, has translated this work into the English language, with additions as to the American and English theory and practice, under the title, "*International Civil and Commercial Law as Founded upon Theory, Legislation and Practice.*"

used even more energetic terms when he said ("Institutes of the Law of Nations", 1, p. 357) "Private international relations are relations of right on the one hand and duty on the other"; and then afterwards he calls the "*comitas gentium*" "an old woman's fable." However, notwithstanding this energetic opposition, it must be said that the Anglo-American theory of international private law suffers from being placed upon so unsound a basis.

In view of the fact that most of the nations of Europe under the leadership of the Netherlands have entered into conferences for the purpose of settling questions of private international intercourse, in the most expedient way, by the establishment of binding rules, we may say that they have definitely broken away from that historical epoch wherein the question was merely deemed one of favor or courtesy. Two propositions are thus embraced:

1. Foreign private law is, upon principle, of the same value as the internal.

2. There is a legal duty to apply foreign private law to an issue when it is subjected thereto.

As the European international conferences have now been repeatedly held, and as rules have been accepted for solving conflicts of law, theories many centuries old may be deemed as surrendered and definitely done away with.

As it is my purpose to discuss the principal questions of the four Hague Conferences, it will be necessary to sketch the results in outline, avoiding all detail. Some slight indication of the manner of procedure, however, will be in point. From the First Conference, it was self-understood that the French language should be the medium of expression, and so it remained. Then, too, from the very beginning, committees were appointed to discuss particular topics more freely and in detail, and thus to arrive at concrete solutions. From 1900 onward a splendid practice arose of having the various governments assume attitudes with regard to concrete questions. The Government of the Netherlands then collected these comments and propositions and sent them in due time to the various governments with those of the special committee of the Netherlands. The president of the committee for the time being also prepared the detailed report and proposal to lay before the Conference as a whole; sometimes a special appointment was made for a report. The preparation of the report is a very laborious task, and we were often obliged to appeal to the untiring courtesy

of the French delegates.¹ The report was first examined and discussed by the members of the committee. The topic then came for discussion before the entire Conference, where, of course, any delegate could propose amendments. As a rule there were two readings. The second was usually intended only for correction of the text and for further discussing and voting upon the questions. Still, there were exceptions, as, for instance, where at the last moment the president of the Conference discovered some new combination for the solution of existing differences. But this did not often occur. State-Councilor Asser, who was re-elected president at each of the four Conferences, proved himself so much the soul of the whole enterprise as always to discover a solution at the proper time.

I. THE WORK ACCOMPLISHED BY THE CONFERENCES

The four international Conferences already held have undertaken the most varied topics.

The work of the international Conferences should properly be divided into three groups, for they represent subjects which, on principle, should be kept separate :

(A) *International Civil Procedure.*

(B) *International Private Law.*

(C) *International Bankruptcy Law.*

§ 2. **A. International Civil Procedure.** — In 1899 a treaty was ratified between the fourteen nations which were represented at the Second Conference. It bears the following title : "Convention pour établir des règles communes concernant plusieurs matières de droit international privé se rapportant à la procédure civile." The exchange of ratifications occurred April 27, 1899. The duration of the treaty was for five years, *i.e.*, until April 27, 1904; but as no state gave notice of termination before that time, the treaty is extended until April 27, 1909, in accordance with an express provision.² In view of the fact that practice has shown a number of defects in this treaty its revision was part of the order of the

¹ It is a privilege for me to refer here, with particular recognition, to the services of the celebrated French internationalist, L. Renault, under whose presidency I labored at each Conference.

² The treaty is printed in French and German in the appendix to my pamphlet "Das internationale Privatrecht und die Staatenkonferenzen im Haag" (Zürich, 1900). See also *C. D. Asser* in "Report of the Twentieth Conference of the International Law Association" (London, 1901), p. 299. The text is printed in English at p. 305. See also *T. M. C. Asser* : "La convention de la Haye du 14 Novembre, 1896, relative à la procédure civile" (1901).

day for the Conference of 1904, and in fact a new treaty has been elaborated to take the place of the old; naturally the contracting states are at liberty to conclude a new treaty at any time. The present Hague Convention deals with the following topics:

(a) Communication of acts, judicial and extra-judicial (notices, transfers, citations).

(b) Rogatory letters or commissions.

(c) Alien security.

(d) Procedure in the case of poor persons.

(e) Imprisonment for debt ("contrainte par corps").

The provisions upon all these subjects are those which are of importance to *international* intercourse — the internal or local law remained for the most part untouched. Thus, for instance, imprisonment for debt was not directly done away with, but it was stated to be applicable as against aliens only in case it was permissible against native subjects.¹

Throughout the territory in which the treaty is in effect, the *communication* of legal acts (in the broadest sense) has been elevated to the position of a *formal obligation* in international law, and a refusal is justifiable only in the event of most particular reasons.²

So far as *citations* are concerned, it is obviously a demand of justice that the particular person shall actually receive them when in a foreign country, for otherwise the action will have been based upon a doubtful fiction. A certain guaranty for the fulfilment of this requirement has been obtained in so far as the forwarding of documents is now a treaty obligation. On the other hand, it cannot be denied that the system existing in some European countries, of a "*remise au parquet*" (France, Italy),³ or the delivery of the citation to the clerk of the court (Austria), has not yet been done away with. The question has arisen in practice as to whether the communication of legal documents, provided for in Article 1 of the treaty, is complete upon delivery to the local officials, or not until delivered to the addressee. But the Conference did not wish to encroach upon the internal law of procedure, and to this effect the

¹ Cf. *Kleinfeller*, "Ueber den Einfluss der Konkursöffnung auf die Personalhaft mit Rücksicht auf Art. 17 des Haager Abkommens", in "Z. für internationales Privat- und öffentliches Recht", XIII, pp. 1-11. The statement made in my book: "Das internationale Zivilprozessrecht auf Grund der Theorie, Gesetzgebung und Praxis", Zürich, 1904, p. 30, is subject to correction.

² This has also been properly stated by *C. D. Asser*, cited *supra*, p. 301. Cf. also my book, "Das internationale Zivilprozessrecht."

³ Cf. my "Internationales Zivilprozessrecht", pp. 182 *et seq.*

treaty had been interpreted in the reports elaborated in the several states, in connection with the granting of the parliamentary sanction. At the Fourth Conference the matter was made entirely clear. Belgium proposed bluntly to insert the following clause in the treaty:

“La signification ne produit son effet qu'à partir de l'accomplissement de ces formalités” (*i.e.*, after actual delivery to the party designated).

But the Fourth Conference refused to go so far, and merely expressed *the wish* that the system of “remise au parquet” (and the like) should be abolished by means of revision of the internal law or by treaty. It is precisely here that the Conference showed clearly how carefully it avoided encroaching upon the positive legislation of the various states. I also voted to this effect, although I regret exceedingly the existence of such systems.

Particularly important for the development of the law is the provision whereby the states obligate themselves *for the execution of letters rogatory*. Within the territory affected by The Hague treaty, a peculiarly important obligation of international law has thus been established, and I hasten to add that the revisory project of 1904 has even strengthened it (see *e.g.* Art. 11). The proposition was also established, that if the court to which the commission is addressed is not, or is no longer competent, it shall be forwarded to the court actually competent. And as to the revision of 1904 the following important addition was made (Art. 11):

“L'autorité requérante sera, si elle le demande, informée de la date et du lieu où il sera procédé à la mesure sollicitée afin que la partie intéressée soit en état d'y assister.”

The present convention placed the right to accord or refuse assistance by way of the execution of letters rogatory (and the delivery of documents) within positive boundaries, in that Art. 2 (see also Art. 7) provides that a refusal is justifiable, only if the state within which the assistance is to be accorded is of the opinion that its sovereignty or safety is endangered. It was intended in this way that international assistance should be extended. But it cannot be demanded, for example, where the inquiry concerns matters which the nation whose aid is required deems a state secret or which refer to secret governmental information.¹

¹ Cf. as to the details of my book, “Internationales Zivilprozessrecht”, p. 55.

Of further importance is the fact that the treaty provides that attention *may* be given to some particular forms of law of the state from which the commission *emanates* (Art. 10). Some systems of law forbid an oath to be taken by the parties to the action, witnesses or experts, or do not permit the presence of the parties and their representatives at the taking of testimony. In such cases a concession may be made "ex comitate gentium" if the state from which the commission emanates makes the request and the state executing it does not forbid the procedure desired.

The original treaty did not regulate *the question of the costs* of commissions, but the revisory draft of 1904 has done so; it establishes the proposition that commissions are to be executed without costs, except the expenses of witnesses and experts and those costs which arise from the intervention of an official ("huissier") for the purpose of compulsory citation of witnesses (Art. 16). If this principle be accepted, the proposition will have been recognized that the according of assistance in legal matters, in the broadest sense of the term, is a universal duty on the part of the nations.

The Hague treaty abolished also *alien security*, or that which a plaintiff was obliged to give by reason of being a foreign subject, or of having no residence in the land. Herein lies, in my opinion, very considerable progress, as the giving of security unreasonably impedes the prosecution of subjective rights.

On the other hand, the international *execution of judgments* has been secured, so far as concerns processual costs. As is well known, the question of the execution of foreign judgments is the most difficult to be found anywhere. Both the Institut de droit international and the International Law Association have labored strenuously in this connection¹ and their work is to be deservedly appreciated. At the meeting of the International Law Association at Rouen in 1900 a draft was advanced by Alderson Foote which is printed in English in the "Report of the Nineteenth Conference" (London, 1900), pp. 196 *et seq.*, and in French at p. 204. To this project certain amendments were proposed for the meeting in Glasgow ("Report of the Twentieth Conference", pp. 274 *et seq.*). A number of critical remarks are also to be found in the later report, pp. 282-298.

The question of the execution of judgments was again dis-

¹ I refer to my publication, "Geschichte und System des internationalen Privatrechts im Grundriss" (Leipzig, 1892), pp. 170, 171; and also to my pamphlet, "Reflexionen über die Exekution auswärtiger Zivilurteile" (Zürich, 1902).

cussed at the meeting of the International Law Association in Glasgow in 1901, but no conclusion was reached ("Report of the Twentieth Conference", London, 1901, pp. 309-325).

The International Law Association has lately concluded to limit an agreement as to the recognition of foreign judgments, to judgments for a sum of money. Art. 1 of the draft reads as follows: ("Report of the Nineteenth Conference", London, 1901, pp. 196, 197.)

"This convention shall relate to and operate in respect to the following judgments only, viz., *judgments for the payment of an ascertained sum of money*, whether by way of debt, damages or costs, by one person to another. . . ."

To Art. 1 of the draft of A. Foote there is the following note: ("Report of the Nineteenth Conference", 1900, London, 1901, p. 197.)

"It is suggested that there is no practical chance of obtaining legislation, or even agreement, at any rate for the present, except by confining the attempt to the simple case of a judgment *in personam* for an ascertained sum of money."

It is just these expressions which the two principal societies of international law have made, that give manifest proof that the international conferences have acted wisely in being satisfied for the present with the proposition that judgments for costs shall be executed by the states. Progress in the world almost always starts in a small way, and if the matter proves satisfactory as to that much, greater results can so much more surely be expected in the same direction. I may add that the Fourth Conference, of 1904, engaged itself more in detail with this fragment for the execution of judgments, and especially that the gratuitousness of the execution was agreed upon (Art. 18). I would like, furthermore, to emphasize that the whole subject was *formerly* attacked in the wrong way. Its regulation can be arrived at correctly only in connection with an agreement as to the *fora*.¹

Finally, The Hague Convention contains a provision *in favor of poor persons*. Foreign subjects shall be admitted to the privileges of poor persons equally with natives. In my opinion, this represents progress from the point of view of international philanthropy.

¹ I developed this idea further in my pamphlet, "Reflexionen über die Exekution auswärtiger Zivilurteile." Naturally, I will again recur to it in the last part of my book, "Das internationale Zivilprozessrecht."

There are those who include hereunder the exemption from giving security and the right to gratuitous representation. In this connection, reference may be made to a report of Coldstream of Edinburgh: "The expediency of uniformity in the procedure of the costs of civilized countries with regard to pauper litigants", and to the "Twenty-first Report of the International Law Association", p. 39.

§ 3. **B. International Private Law.**—The Hague Conference elaborated draft treaties dealing with conflicts in various departments of the private law, viz.:

(a) *Upon certain topics of family law.*¹

(1) *Entrance into marriage.* (2) *Divorce.* (3) *Guardianship of minors.*

Each one of these topics is treated of in a convention. The three treaties were accepted by the parliaments of the following seven nations, ratifications being exchanged on the first day of June, 1904, at The Hague, while we were assembled at the Fourth Conference:² France, Germany, Belgium, Netherlands, Luxemburg, Roumania, and Sweden.

The other nations have not yet expressed a determination to join, though Austro-Hungary, Italy, and probably also Spain and Portugal will do so before the end of 1904. Switzerland has, for various reasons, not been in a hurry to lay the matter before the federal parliament. In the first place, the concessions demanded for the benefit of the domiciliary law in regard to guardianship were not made, and furthermore, a difficult situation is presented for the reason that the work of codifying a civil code is just now occupying foremost attention.

(b) *Upon the effects of marriage upon the personal rights of spouses and their rights of property.*

In its "projet de programme" of December, 1897, the Government of the Netherlands proposed a draft entitled, "Dispositions concernant les effets du mariage sur les biens des époux."³

¹ Upon the two treaties regarding entrance into marriage and divorce, certain comments are to be found in the work of *Leske and Löwenfeld*: "Die Rechtsverfolgung im internationalen Verkehr." Fourth volume: "Das Eherecht der europäischen Staaten und ihrer Kolonien", 1904, pp. 986-996.

² *Simon E. Baldwin* discusses these treaties under the title, "The New Code of International Family Law" ("Yale Law Journal", June, 1903, p. 487). This author is in error, however, in stating that the treaties went into effect, as to most of the participating nations, on August 12, 1902. He was led to believe that the signing by the diplomatic representatives on June 12, 1902, already involved the exchange of ratifications.

³ The draft is printed in my pamphlet, "Das internationale Privatrecht und die Staatenkonferenzen im Haag", pp. 60, 61.

It was proposed to divide the subject-matter for the Third Conference as follows :

“A. Les effets du mariage sur l'état et la capacité de la femme (‘Documents relatifs à la quatrième Conférence’, 1904, p. 52).

“B. Les effets du mariage sur les biens des époux (‘Documents’, p. 64).

“C. Les effets du divorce et de la séparation de corps (‘Documents’, p. 80)”.

The Fourth Conference then worked out a uniform draft entitled :

“Projet d'une convention concernant les conflits de lois relatifs aux effets du mariage sur les droits et les devoirs des époux dans leurs rapports personnels et sur les biens des époux.”

Meanwhile, I may mention here that this draft treaty is not yet ripe for acceptance ; there was such an extraordinary number of difficulties discovered when it was tested in detail, that a more far-reaching study of it is required. Under these circumstances, it would not be to the purpose to discuss it further here.¹

(c) *Upon the law of succession.* The First Conference was already well aware that the proposal could not be viewed as a definite one, for even the introduction (“Actes de la Conférence, I partie”) contained a reservation (“sous la réserve expresse des dérogations que chaque état pourra juger nécessaire, au point de vue du droit public ou de l'intérêt social . . .”). The Second Conference again occupied itself with the subject (“Actes de la deuxième Conférence”, p. 125), as did also the Third Conference (“Actes de la troisième Conférence”, p. 107), which elaborated a draft treaty entitled :

“Projet d'une Convention pour régler les conflits de lois relativement aux successions, aux testaments, et aux donations à cause de mort.”

But this treaty was not received with enthusiasm by the participating nations, and the Government of the Netherlands preferred not to advise a preliminary signing by the diplomats. It thus becomes clear how the Fourth Conference again took up the subject upon the basis of a whole series of criticisms made by the several nations (“Documents relatifs à la quatrième Conférence”, 1904,

¹ I refer to my pamphlet, “Das internationale Privatrecht und die Staatenkonferenzen im Haag”, pp. 60-66.

p. 28). At the Fourth Conference, a tendency was shown to deal only with certain isolated questions of the law of succession and not with all the questions connected therewith. It was, moreover, expressly declared that the convention was not intended to regulate :

- (1) gifts,
- (2) contracts for succession,
- (3) the position of juristic persons in matters of succession.

Thus it comes that the draft convention now bears the title :

“*Projet d'une Convention sur le conflit de lois en matière de successions et de testaments.*”

The Conference of 1904 expressed the following desire :

“*Que le Gouvernement des Pays-Bas veuille bien, aussitôt que possible après la signature de la Convention sur les successions et les testaments, convoquer une nouvelle Conférence, qui aurait pour mandat de préparer le protocole additionnel visé à l'art. 6, § 2 de la dite Convention aussi que la Convention relative à la compétence et à la procédure en matière de successions et de testaments visée à l'art. 8.*”

Art. 6, § 2, here cited, refers to the specification of imperative or prohibitive rules of law, the applications of which are demanded by the internal or local law, even though a foreign system of law, in successory matters, be applicable in other respects.

And Art. 8 provides :

“*Aussitôt que possible après la signature de la présente Convention, les États contractants établiront d'un commun accord les règles concernant la compétence et la procédure en matière de successions et de testaments.*

“*La convention contenant ces règles sera ratifiée en même temps que la présente Convention.*”

The conventions bearing upon private law prepared at The Hague refer to family law and succession ; it would seem appropriate to discuss briefly their principal features.

§ 4. **Same : 1. The Convention upon Marriage.** — This convention refers only to the conditions necessary for the validity of the marriage, and in this connection sets up the following rules — I will here again restrict myself to the main points :

“**ART. 1.** The right of contracting marriage is determined by the national law of each of the parties intending to be married. . . .”

The standard rule for the solution of conflicts of law in Continental Europe is the *national law*, whenever the question is one of the so-called personal statute (or, status) and this arises when *capacity* inherent in personal rights is under discussion. This embraces, without doubt, the capacity to enter into marriage. The laws of the nations of Continental Europe hold that the national state alone is in proper position to determine the conditions necessary for the conclusion of the marriage tie. Of special importance in this connection is the age necessary, which varies with climatic conditions. There are then an array of further points connected with social and moral order, as, for instance, impediments connected with relationship. It is intended in Europe that authoritative control by the "*lex patriae*" shall be a guaranty that the spouses shall not conjure with the local laws by placing themselves, for a shorter or longer time, under a different system of law. Art. 1 is thus explained.

Upon this momentous question, the English-American conception differs from that of Continental Europe; for the former lets it depend upon the law of the domicile, yea, even that of the mere place of sojourn. And I must add that England became the matrimonial Eldorado for persons desirous of marrying and who were unable to reach the goal in Continental Europe, much in the same way as was Scotland for English men and women, when Gretna Green marriages played a rôle. In fact, so long as conditions for the validity of a marriage are less irksome in other more or less accessible countries, it is really only a question of the pocket-book, whether the marriage cannot be entered into in opposition to the national law. *The Hague Convention intends that an end shall be put to this situation within the territory it affects.*

It is true, however, that the principle has been moderated so as particularly to meet the demands of Switzerland. The following clause has been added:

" . . . unless such national law refers expressly to some other law."

Art. 25 of the Swiss federal statute upon civil status and marriages provides:

"Sera reconnu comme valable dans toute la Confédération le mariage conclu dans les cantons ou à l'étranger, conformément à la législation qui y est en vigueur."

And the clause cited represents a concession made to Switzerland. I pointed out at the time, before the committee on marriage law, that there was no sufficient ground to force Switzerland to refer to the national law, upon a topic in which her laws were so international in spirit as to recognize all marriages concluded abroad according to the law there in force.

It was further said, that the legislation of the domicile should also be given a certain influence, because it cannot permit the conclusion of a marriage under all circumstances simply because the national law permits it. The international conferences found that in certain particularly salient cases, the domiciliary state need on no account permit the conclusion of a marriage. Three cases are cited in Art. 2, which reads as follows :

“ART. 2. The law *Loci Celebrationis* can refuse to marry aliens if their marriage would be contrary to its own laws regarding :

“1st. Prohibited degrees of relationship for which there is an absolute prohibition.

“2d. Absolute prohibition to marry brought against parties guilty of adultery, for which reason the marriage of one of them has been dissolved.

“3d. Prohibition to intermarry brought against persons condemned for having attempted to murder the husband or wife of one of the parties.”

It is then further provided :

“A marriage performed contrary to one of the above-mentioned prescriptions shall not be void, provided it would be valid according to the law referred to in Art. 1.”

“ART. 3. The *Lex Loci Celebrationis* can permit marriage of aliens notwithstanding the prohibitions of the law mentioned in Art. 1, when these are exclusively founded on reasons of religious character ; but the other countries have the right not to consider as valid a marriage performed under such circumstances.”

The conference has here tempered the influence of the national law in the interest of the freedom of the marriage tie. Where the national law forbids a marriage for religious reasons, *e.g.*, between Christians and Jews, another state is not obliged to forbid the conclusion of the marriage. This would be in contravention of the great principle of freedom, and I moved the committee at the time to respect it, and succeeded (“*Actes de la troisième Conférence*”, 1900, p. 174). A balance upon this proposition lies in the fact

that other nations (besides that of the “*lex loci celebrationis*”) may regard such a marriage as invalid.

I will cite still another provision, viz. :

“ART. 5. The marriage performed in accordance with the law *Loci Celebrationis* will be as regards its form everywhere considered a valid marriage.

“It is, however, understood that countries whose legislation requires a religious marriage ceremony will be free to consider as invalid a marriage performed by their subjects abroad, where this religious requirement has not been fulfilled.

“The requirements of the national law *re* publications must be fulfilled, but the absence of these publications will not render the marriage voidable in other countries, excepting in those countries whose laws have been disregarded.

“An authentic copy of the Marriage Act shall be sent to the authorities of the countries of both husband and wife.”

The well-known rule of “*locus regit actum*” is here also applicable. But at the demand of Russia we agreed to a modification of the rule, as this nation only recognizes marriages solemnized by its church. It is for this reason that orthodox Russians marrying in Switzerland are always notified to have the marriage solemnized at the Russian church in Geneva, after the civil ceremony. According to Art. 5, Russia is entitled to regard marriages performed abroad without a solemnization by the Russian church as *invalid within its territory*. But this concession was not sufficient for Russia, and it did not join the convention; it advanced the claim that marriages of Russians performed abroad according to the form of civil ceremony there in force, should be regarded as invalid *everywhere*. This unwarranted mastery by the “*lex patriae*” could not be acceded to by us. As Russia therefore did not join the convention, the concession made for it was useless. The result shows that, under circumstances, too much courtesy can be shown to a state!

§ 5. **Same: 2. The Treaty upon Divorce.** — The regulation of divorce in international matters was equally as important as that of the entrance into marriage. As early as the First Conference, I moved (“*Actes*”, 1893, p. 71) that this subject be placed upon the “*tractandum*” list. I will take up two questions here.

1. It was difficult to find a principle to serve as a solution here, in view of the fact that legislation upon divorce differs greatly throughout the world; that particularly certain Catholic countries

(Austria, Italy, Spain, Portugal) recognize only a "séparation de corps" of their Catholic subjects and not an absolute divorce; that other nations only permit of the latter; that certain systems of law recognize many grounds for divorce, while others have only a few (England, America). Now, the Institute of International Law proposed the following provision in its "Règlement des conflits de lois en matière de mariage et de divorce:"¹

"ART. 17. La question de savoir si un divorce est légalement admissible ou non dépend de la loi nationale des époux.

"ART. 18. Si le divorce est admis en principe par la loi nationale, les causes qui le motivent doivent être celles de la loi du lieu où l'action est intentée.

"Le divorce ainsi prononcé par le tribunal compétent sera reconnu partout."

From the very beginning, I maintained before the committee that this idea developed by the Institute represented a splendid means of reconciling the two main principles of "lex patriae" and "lex domicilii." I pointed out that the primary question in this branch of law was whether the nations recognized absolute divorce at all, and that the particular grounds were a secondary question. The first question should therefore be determined by the "lex patriae." If denied by the national law, the domiciliary state cannot grant the divorce. Thus Italians, Portuguese, and Spaniards could not be divorced at their place of domicile, even though the law of that place recognized absolute divorce. If, however, the national State permits of divorce, the grounds of divorce will be determined by the law of the domicile.

But this "sententia media" advanced by me did not gain a victory in the committee.

In 1894 the opinions were much divided; but in 1900 the idea was adopted which the majority had already in 1894. It was demanded that both the national *and* the domiciliary state must recognize the institution of divorce, and that also the grounds of divorce must exist according to *both* systems of law. The same principle was adopted as to the "séparation de corps." The authoritative rules read as follows (and I note that a small change was made in the first paragraph of Art. 2 through diplomatic negotiations):

¹ It is printed in my publication, "Geschichte und System des internationalen Privatrechts im Grundriss", pp. 73-75. It has been published in Spanish by *Torres Campos*, "Bases de una Legislación sobre Extraterritorialidad." Madrid, 1896, pp. 188-190.

“ART. 1. Les époux ne peuvent former une demande en divorce que si leur loi nationale et la loi du lieu où la demande est formée, admettent le divorce l’un et l’autre.

“Il en est de même de la séparation de corps.

“ART. 2. Le divorce ne peut être demandé que si, dans le cas dont il s’agit, il est admis à la fois par la loi nationale des époux et par la loi du lieu où la demande est formée, encore que ce soit pour des causes différentes.

“Il en est de même de la séparation de corps.”

It is true that a small modification of the principle was made, because in Italy divorces have been granted to aliens where their national law so permits, although Italy itself did not recognize the institute of divorce at the time. The case is very remarkable, but the matter is settled. It is a kind of discounting of the divorce project in Italy.¹

I cannot say that the provisions of Arts. 1 and 2 have my full sympathy; for in the particular case, it may be very difficult to prove a concordance between two systems of law, and I do not consider it proper to try to solve the difficulties in international private law by *demanding the observance of two laws* — that means simply adding to the difficulties of the situation. It is true, the Third Conference tempered the principle by means of a rather subtle distinction. An accordance of the two laws as to the ground for divorce is no longer required, but simply that *one* ground shall exist by the “*lex patriæ*” and another by the “*lex domicilii*.” Each ground is then considered internationally as a half-ground (“*demie-cause*”) and two half-grounds make one whole ground. It is that which has been expressed still more clearly by the additional clause in Art. 2, “*encore que ce soit pour des causes différentes.*”

2. Special difficulties were also presented in the variously regulated jurisdiction of the courts² to deal with actions for divorce. According to the English and American view, the courts of the domicile have the right to determine actions for divorce. From the Continental European point of view it is surprising that a married woman may acquire an independent domicile so as to obtain a divorce at a remote place after a short sojourn. The exceptional peculiarities contained in the laws of South Dakota and

¹ Cf. my publication, “Das internationale Privatrecht und die Staatenkonferenzen in Haag”, pp. 51–53.

² The details are given in my “Internationales Zivilprozessrecht”, pp. 223 *et seq.*

Oklahoma Territory have made these places known also in Europe as divorce factories.¹

Other countries accord only the *national* courts jurisdiction to grant divorces to their own subjects, while others recognize the home forum only as an exception.

The convention did not found or create any forum, but made the jurisdiction of the court dependent upon the particular system of law. Especially important are Arts. 5 and 7. I will quote Art. 5:

“ART. 5. La demande en divorce où en séparation de corps peut être formée:

“1. Devant la juridiction compétente d’après la loi nationale des époux.

“2. Devant la juridiction compétente du lieu où les époux sont domiciliés. Si, d’après leur législation nationale, les époux n’ont pas le même domicile, la juridiction compétente est celle du domicile du défendeur. Dans le cas d’abandon et dans le cas d’un changement de domicile opéré après que la cause de divorce ou de séparation est intervenue, la demande peut aussi être formée devant la juridiction compétente du dernier domicile commun. Toutefois, la juridiction nationale est réservée dans la mesure où cette juridiction est seule compétente pour la demande en divorce ou en séparation de corps. La juridiction étrangère reste compétente pour un mariage qui ne peut donner lieu à une demande en divorce ou en séparation de corps devant la juridiction nationale compétente.”

§ 6. **Same: 3. The Treaty upon the Guardianship of Minors, and the Draft Convention upon Interdiction.** — (1) Both conventions are based upon the same principle: The “*lex patriae*” was here again the victor. Art. 1 of the “Convention pour régler la tutelle des mineurs” reads as follows:

“La tutelle d’un mineur est réglée par sa loi nationale.”

And Art. 1 of the “Projet d’une Convention concernant l’interdiction et les mesures de protections analogues” provides:

“L’interdiction est réglée par la loi nationale de la personne à interdire, sauf les dérogations à cette règle contenues dans les articles suivants.”

(2) If the national state does not institute a guardianship over minors, the local officials may do so, but they are here again restricted to the grounds recognized by the national state.

¹ See “*Zeitschrift für internationales Privat- und Strafrecht*”, IV, pp. 404–407.

In regard to interdiction (of persons physically weak or insane, spendthrifts) Art. 7 demands that in the event of officials of the place of sojourn instituting the proceeding, the law of that place *and* of the national state must permit of it. Scientifically, the cumulation of two systems of law is objectionable — I do not find it a nice solution.

(3) Interdiction produces an effect everywhere so far as the capacity of the interdicted person to act is in question. Still, the state of sojourn may provide that the proceeding instituted by the foreign state must first be made publicly known there before such effect be given it. The limitation upon the capacity to act will then date only from that time forth as against innocent third parties.

Art. 9 is not intended to mean that every interdiction, *e.g.*, also that based upon a declaration of weakness of mind, must be recognized everywhere. According to the “Actes de la IV Conférence”, the question of personal freedom remains untouched — in the discussion my colleague Roguin clearly explained this question, upon which we lay great stress in Switzerland, and all the delegates were entirely agreed in relation to it.

§ 7. **Same: 4. The Treaty upon Succession.** — The draft elaborated in 1904 differs materially from the earlier drafts. It may be said to rest upon four principles:

(1) It enacts the unity or universality of the estate; so that immovables may not be subjected to the law of succession in force at the place of their situation.

In Continental Europe, this rule is regarded as very important, although France, Belgium, Netherlands, Hungary, and Russia support a different system. The scientific writers of all these states, however, recognize that the condition of the law requires reform. The estate should not be cut up and subjected to various systems of law.

(2) The estate is subjected to national law in regard to the transfer to the heirs, the rank of the heirs, their quota, representation, deduction for advances, and the peremptory quota.

Norway, Denmark, and Switzerland have up till now supported the principle of the domicile. As representative of Switzerland, I attempted a compromise upon the basis of the existing laws. Art. 22 of the federal statute upon the legal relationships of persons domiciled and sojourning, provides:

“Succession is governed according to the law of the last domicile of the deceased.

"A person may, however, subject the succession to his estate to the law of his home country by testamentary disposition or contract for succession."

This rule applies also to aliens residing in Switzerland (Art. 32).

I stated to the Conference (*cf.*, *e.g.*, "Actes de la troisième Conférence", pp. 85-87) that there should also be a means of reconciling the domiciliary with the national law in matters of succession. I therefore proposed, among other things, to let the "lex patriae" govern, but to give the testator the right, by a formal act, to designate the domiciliary law. I thus reversed the Swiss provision. I pointed out that many individuals in modern times are intimately connected with the domiciliary state, and therefore it is improper to restrict them to the law of succession of the national state, to which they are bound by weak ties only.

But the majority continued to hold the view that the national law must alone be authoritative.

(3) Aliens are upon equal footing with natives, in matters of succession.

This had to be stated particularly, because some countries of Europe still give prior rights to native subjects over pieces of property situated in the local territory.

This rule is based upon the French law of 1819.¹

(4) The attempt is made to specify the so-called imperative or prohibitive rules by means of declarations to be given by the governments of the participating nations within a certain time (Art. 6). This matter will be treated further at the next Conference.

The difficult question of jurisdiction in disputes over successions will be also discussed at the next Conference.²

§ 8. **C. International Law of Bankruptcy.** — The international conferences dealt here with a subject basically differing from the others. Whereas, international private law deals with the question whether local or foreign private law is applicable to a particular legal relationship, or whether in instituting a guardianship, State A is entitled to place an individual of State B under the machinery of guardianship, international bankruptcy law has for its object the determination as to whether a local bankruptcy of its own force affects assets situated abroad, and whether a foreign bankruptcy affects assets in the local state; so also as to what influence

¹ *Cf.* my work, "Internationales Civil- und Handelsrecht", II, p. 133; *Kuhn's* translation, § 136, II, 2.

² Germany elaborated a draft relating to the jurisdiction of the courts, which is printed in my "Internationales Zivilprozessrecht", pp. 256 *et seq.*

bankruptcy has upon the legal position of the bankrupt internationally and as to how the various proceedings such as certificates of incomplete payment, compromise agreements, or discharges are to be interpreted internationally (a question which may also arise intercolonially). Thus it will become important to determine how far a question is one of the internal law of execution (procedure) and how far one of foreign substantive law, and to what extent each shall be applied. Of course, in international bankruptcy law, the entire subject of international private law may come into point.¹

The subject was taken up at the Second Conference (1894) but the project then elaborated designated itself only as a preliminary work ("Actes de la deuxième Conférence", 1894, pp. 59-62). At the Third Conference, the subject was again dealt with, but no draft resulted ("Actes de la troisième Conférence", pp. 147-151).

Since some considerable time, the idea thrown out by Savigny ("System des römischen Rechts", VIII, p. 283) has been widely followed, particularly by Italian jurists, to the effect that a bankruptcy is possible only at one place; they put the conception of the "pluralité" or "territorialité de la faillite" over against that of "unité."² This principle was supported also by an international congress held at Turin, which formulated detailed conclusions.³

The same tendency was evidenced also by the Institut de droit international.⁴ It formulated in Paris, in 1894, "Règles générales sur les rapports internationaux en matière de faillite" ("Annuaire", XIII, 1894-95, pp. 279-281) and Roguin worked out proposals for the meeting at Brussels ("Annuaire", XIX, 1902, p. 115; discussion at pp. 232 *et seq.*). The Institute concluded to rest upon the results of the discussion — certain questions were not determined, but were left in suspense for regulation later. (Art. 4 of Roguin's proposal; the equalizing of the non-merchant with the merchant; the position of minors, interdicted persons, etc.; also the question of mortgages and priorities.)

¹ This remark has already been made by *Lyon-Caen* and *Renault*, "Traité de droit commercial", VIII, 3d edition, No. 1225.

² Cf., e.g., *Gemma*, "Il fallimento nei rapporti internazionali", 1897, p. 12. The whole tendency is reflected in the publication of *Carle* entitled, "La dottrina giuridica del fallimento nel diritto privato internazionale", 1872.

³ Cf. my "Geschichte und System des internationalen Privatrechts im Grundriss", pp. 176-177.

⁴ *Kohler* very unfavorably criticizes the resolutions of the Institut de droit. ("Civilistisches Archiv," 96, pp. 348-349.) He says they are far from grasping the difficulties of the question, and that their deliberations cannot be regarded as assisting matters.

The draft treaty of Montevideo (1889) also treated of bankruptcy, but without establishing the rule of universality. The provisions are printed in the papers of the International American Conference and are entitled, "Reports of Committees and Discussions thereon", Vol. II, pp. 900-902.¹

The idea of the universality of bankruptcy is at first sight most captivating. It expresses the view that bankruptcy proceedings have extraterritorial effect, that they affect all the assets of the bankrupt wherever found, and that the administrator in bankruptcy at the place of bankruptcy may distribute equitably for all creditors. But as soon as the question is approached practically, it becomes clear that Wharton ("Conflict of Laws", § 807) not unjustly speaks of the "romantic cosmopolitan efficacy" of the bankruptcy decree.² To effectuate the bankruptcy upon assets throughout the world is a matter of extraordinary difficulty:

1. Because of the diffusion of the various parts of the estate.

2. Because of the prosecution of claims at *one* place — the linguistic difficulties may here be referred to.

3. Circumstances may arise which may have to do with the credibility of foreign officials, the firmness of foreign courts in dealing with doubtful bankruptcies, and in seeing that all creditors are treated alike. In a word, it is a question of the most intense mutual confidence.

Under these circumstances The Hague Conferences did not attempt to elaborate a draft treaty intended to be binding upon all the participating nations. The Conference of 1904 satisfied itself by working out a *model treaty* for *such* nations as may desire to enter into treaty relations upon bankruptcy with each other, permitting each state to determine whether or not it will conclude a treaty with any other.³

Some few such treaties have been concluded in modern times, sanctioning, upon this modest basis and between the states concluding them, the universality of bankruptcy proceedings. In this connection, reference is to be made to the following treaties:

¹ The provisions are also to be found in my "Kodifikation des internationalen Zivil- und Handelsrechts", pp. 133-146, and in "Zeitschrift für internationales Privat- und Strafrecht", I, 480-482 (*Heck*).

² Cf. also *Kleinfeller*, "Die Universalität der Wirkungen des Konkurs-eröffnungsbeschlusses", in "Zeitschrift für internationales Privat- und öffentliches Recht", XIII, pp. 549-574.

³ There are also treaties dealing with bankruptcy law among other topics, as for instance, certain treaties concluded by the German Empire (cf. *Böhne*, "Die räumliche Herrschaft der Rechtsnormen", 1890, pp. 212-214). The settlement and consular treaty of Italy with Switzerland of 1868 also contains *one* provision of bankruptcy law (Art. 8).

1. Between France and Switzerland, 1869 (Arts. 6–9 of the treaty on the jurisdiction of the courts treats of the law of bankruptcy).
2. Between France and Belgium, 1899, Art. 8.
3. Between Württemberg and Switzerland, 1826. (The treaties with Bavaria and Saxony do not go so far.)

II. THE FUTURE POSSIBILITIES OF ACCOMPLISHMENT

§ 9. **The Prospects of Anglo-American Coöperation.** — The question may be asked whether other nations of the world, particularly England and America, are in a position to participate in The Hague Conferences in the future, and eventually to become parties to the conventions and convention drafts. In this connection the following points may be emphasized :

1. *An affirmative answer may be given in regard to the convention upon the International Law of Procedure.*

Here we have a neutral subject-matter that is, notwithstanding, of considerable importance to the accomplishment of justice. It is imperative that justice shall triumph throughout the world, and particularly also in connection with processual manœuvres. The nations should obligate themselves mutually to lend a helping hand in the matter of citations, the summoning of witnesses, the taking of expert testimony, the forwarding of documents. Further, they should undertake to open the courts of justice to aliens as much as to native subjects, without imposing security and to foreign poor persons in the same manner as the native, etc. They will thus elevate the cause of justice to the rank of humanitarianism and give it the stamp of universality. Only in this way can they fully accomplish the ideal task of justice.

But even exclusive of the fact that this union places international justice upon the only proper basis, a much fairer judgment of the institutions of the various nations is arrived at by the contact of their legal systems. It is similar to the process which the individual undergoes in studying the language and literature of another people ; it may be taken as certain, that every one understanding the language of a foreign people will more justly appreciate their institutions. Furthermore, the several nations are but a part of a greater whole, and we should be solicitous of the welfare of the whole also in the law.

2. *Much more difficult is it to judge the situation in regard to the questions of International Private Law, embracing the convention now ratified by seven nations and the projected conventions.*

In this connection it is necessary to make some general remarks. The theories and rules of law in force throughout the world upon international private law may be divided into three main groups:

a. There is a group of states supporting the rule that their subjects may rely upon their national law in private matters even though abroad, especially in regard to the law of persons, the family, and succession, and that aliens may do the same in the local state. This practice is followed by nearly the whole of Europe with the exception of England, Denmark, Norway, and Switzerland.

b. There is a group of states in which the law of the momentary domicile controls. This is, according to Wharton, the law of the United States of America and also the law of the Province of Quebec, by virtue of a number of provisions of the Civil Code of Lower Canada, *e.g.*, Arts. 6, 7, 8, 135, 599, 600, 776;¹ this is also the law of Argentine and of the treaty of Montevideo.

Wharton, in his "Conflict of Laws", § 8, calls nationality an "unfair standard of personal law."

c. Another group of states looks solely to the law of the place where the parties are located. This is the English view. The American jurist David Dudley Field, in his "Draft Outlines of an International Code" (under title of personal capacity) lays down the following principle (Art. 542).

The civil capacities and incapacities of an individual in reference to a transaction with living persons, except so far as it affects immovable property . . . are governed by the law of the place where the transaction is had, whatever may be his national character or domicile or the place of his birth.

And Field easily deluded himself with the idea that Europe was also tending in this direction, for he says: "It is not the rule now recognized by European international law, *although the tendency of opinion is in this direction.*"

A kind of juristic dogma has existed upon the Continent of Europe for several decades, referable to the new Italian school founded by Mancini, an Italian jurist and statesman, to the effect that the *national* law and statute represent the authoritative and only standard in international matters. Sir Walter Phillimore, in his address before the International Law Association at Glasgow,

¹ Cf. *E. Lafleur*, "The Conflict of Laws in the Province of Quebec" (Montreal, 1898).

1901, spoke of the "more modern school of *French* jurists."¹ This is an error. The doctrine is traceable to Italy, and hence we may speak of the new Italian school.² It arises partly from political considerations in that it is believed that the development of a people into a unified nation necessarily requires that its subjects be respected, as such, also abroad and be considered as subject to national law in matter of civil law. But this is also an error. I recognize thoroughly that the "*lex patriae*" should give the standard in many branches of international private law, but I deny that this principle can claim absolute control; it did not stand the test of practical life in which I was long active. I was never tired of pointing out that a reconciliation should be accomplished between the two main principles, and I have stated that the task of jurisprudence should be scientifically as follows:³

"We should demarcate those elements, on the one hand, which permit the lawmaker to give effect to the law of the domicile or sojourn, and on the other hand, those which influence him to promote and effectuate the continuance of that public bond which connects the individual with his native (home) state."

I have also continually supported this idea of reconciliation at the Conferences ("Actes", 1893, p. 69; "Actes", 1894, p. 37; "Actes", 1900, pp. 85-87). And again, in 1904, I referred to the necessity of sanctioning a "*sententia media*" — I was supported in this by my colleague, Roguin, with a proposal relating to succession, although indeed I had certain doubts as to its practicability. A reconciliation might be accomplished:

1. By setting a period of time after which aliens domiciled in the local state shall be subject to local private law — say a period of five or ten years. We would not by this force aliens to surrender their foreign nationality.

¹ Cf. "Report of the Twentieth Conference", p. 230, where *W. Philimore* says, "The more modern school of French jurists would, if I understand them aright, reject the *lex domicilii* and substitute for it the national law."

² Cf. my handbook, "*Internationales Civil- und Handelsrecht*", I, pp. 120 *et seq.*; *Kuhn's* translation, §§ 35 *et seq.* The first Italian school may be associated with the name of Bartolus.

³ I made this proposal in my pamphlet (out of print): "*Der erste europäische Staatenkongress über internationales Privatrecht*" (1894), p. 10; in my address, "*Der internationale Geist in der Jurisprudenz*" (Zürich, 1897), p. 27; in my article, "*Das Problem des internationalen Privatrechts*," in "*Oesterreichisches Centralblatt für die juristische Praxis*", V, pp. 193-222; in my article: "*Ueber das historische Debut der Doktrin des internationalen Privat- und Strafrechts*" (Leipzig, 1899), p. 12, and in my handbook, "*Internationales Civil- und Handelsrecht*", I, pp. 164-167, *Kuhn's* translation, § 45.

2. By respecting partly the national law and partly the domiciliary law. This middle way would be possible:

a. In the law of persons as to the status.

b. In family law in regard to:

a. Matrimonial property.

β. Divorce.

γ. Guardianship.

3. By making children of aliens born in the local state subjects of that state.

These ideas, I believe, would find favor more easily with the Anglo-American legal world than with the jurists of the European Continent. And perhaps I would have had a greater chance of success if England and America had participated in the Conference — at any rate, I always regretted that these nations were missing at The Hague.¹ An unlimited emphasis of the importance of the “*lex patriae*” is injurious to the unity of private law; for this is destroyed when aliens can claim the application of their national law in the local state. Particularly unfortunate would be the situation, where (as in America and Switzerland) many foreigners reside. On the other hand, it is difficult to fight against articles of faith in jurisprudence, for that is really what we have in the “*lex patriae*” principle. Small states, like Switzerland, are in an especially unfortunate situation, for they must follow the weight of authority of theory and practice even though little convinced of its correctness.

I am, on the other hand, glad to see that the unlimited control of territoriality (English conception) and of the “*lex domicilii*” (American conception: Wharton) is being shaken. In the address of Sir Walter Phillimore before the International Law Association at Glasgow (“Report of the Twentieth Conference”, p. 230) he makes the following noteworthy remarks in mentioning the new school for the application of national law: “I have a great sympathy with this school, and I see much that would be gained in simplicity and certainty by substituting in all questions of personal status the national law for the law of the domicile.” These words

¹ I stated my regret at the absence of the Anglo-American race already in my pamphlet, “Der erste europäische Staatenkongress über das internationale Privatrecht”, Vienna, 1894, pp. 13–14. In my handbook, I, p. 23 (*Kuhn's* translation “International Civil and Commercial Law”, § 5, II, 6), I pointed out that representatives from England and America would have counteracted the exaggerated importance given to the “*lex patriae*.” So, also, in my “Internationales Zivilprozessrecht”, p. 26. *Simeon E. Baldwin* is of a contrary opinion. Cf. “Harvard Law Review”, XVII, p. 402, and “Columbia Law Review”, IV, p. 307.

represent the strongest criticism of the comments of the most reputed English and American authors (Westlake, Wharton, Story, Field). *If these words would gradually gain favor in English and American legal circles, there would be hope for the reconciliation of the two main principles, as proposed by me, and it would then be possible to accomplish uniform rules of conflict between the Old and the New World, by concessions made on both sides.*

But, in the meantime, I seriously doubt whether the time has yet arrived for England and America to become parties to the conventions.¹ *The divergencies in the theories upon the international private law are — even exclusive of the personal statute — very considerable.* I will here merely recall the fact that according to one of the leading tendencies in English and American law, immovables are governed by the law of their situation.² This is true in regard to:

- (a) The capacity to act.
- (b) The form of legal transactions.
- (c) The law of succession.

Now, it must be said that, particularly in North America, there is no adequate legal ground for the control of the locus of the property in regard to immovables when not concerning the determination of real rights; for feudalism, so far as I know, was never introduced in America as it existed in Europe. The theory that wherever immovables are in question (in the law of persons, obligations, succession), the law of the situation of the property must govern was brought over from England essentially as a kind of colonial freight, and England took the rule from the Netherlands — even rules of law may be traced to race wanderings. But even without considering feudalism and the journey that the theory made, it is urgently to be desired that England and America relinquish the unlimited reference of immovables to the place of situation; the rule is to be confined to real rights. It should especially not be applied in the law of succession, because the estate as a unity can and should be subjected to only *one* system of law.

Still, it would be mistaking the tempo of history to demand of the Anglo-American sphere of jurisprudence to alter, as it were, from one day to the other, conceptions to which the people have become attached.

¹ A different question is whether these nations should not be represented at the conferences "ad audiendum et referendum."

² Story, "Conflict of Laws", § 424; Field, "Code", Art. 586; Kent, "Commentaries", 12th ed. by Holmes, p. 429; Wharton, "Conflict of Laws", § 560.

For this is required a longer time, more detailed study, comparative research, and the enlightenment of younger generations.¹

It is also true that there are European nations whose systems of law still support the doctrines of the "*lex rei sitae*" in regard to immovables, *e.g.*, France, Austria, Russia. But in the first two countries, at least, the soundness of the theory has been entirely destroyed, and there is no longer any faith in it. Even in Russia, the celebrated jurist v. Martens is against it "*en pure théorie.*"² In England and America, however, it is an article of legal faith, and we all know how difficult it is to reform it; this particularly so of a people who are very conservative in legal matters.³ No author has opposed the controlling view in these countries.

The Hague conventions were the subject of a general discussion before the International Law Association in Antwerp, 1903. Sir Walter Phillimore made an address also here and discussed "the advisability of the British Government taking part in the legal conference at The Hague on private international law" ("Report of Twenty-first Conference", 1904, p. 80). Phillimore here regretted that Great Britain has, up to the present, not participated in The Hague Conference (and also in other conferences upon maritime law). Sir William Kennedy (Judge of the High Court of Justice in London) proposed a resolution (p. 85) which was accepted (p. 93):

"That this Conference, considering the great importance of the co-operation of the Government of Great Britain in relation to International Conventions for such purposes as are set forth in Sir Walter Phillimore's paper, resolves that it is desirable that the Executive Council of this Association should take steps respectfully to lay before

¹ There is perhaps *one* of the Hague treaties, namely that upon entrance into marriage, which might be acceptable to England and America, for the very reason that in Art. 1 other systems, besides the national law, are reserved for application. Reference may here again be made to a recent discussion by *Sir Walter Phillimore* ("Report of Twentieth Conference of the International Law Association", 1901, pp. 288 *et seq.*). This jurist favors even extending the conditions for a valid marriage, for he proposes the following (238):

"The essentials of marriage should be regulated by the personal law *and* by the *lex loci*; both should be complied with."

In my opinion, this enunciation again goes too far, but it shows plainly how Phillimore has relinquished the belief in salvation solely through the "*lex domicilii*":

² *Martens-Léo*, "*Droit international*", II, p. 455.

³ This is shown also as to the limitation of actions. *Wharton*, § 545, points out that European jurists are opposed to determining limitations by the "*lex fori*"; the reasons he gives are sound, but he holds to the practice. Why? "The rule is now too firmly settled to be shaken." Cf. my handbook, I, p. 210: *A. K. Kuhn's* translation, § 56.

the British Government the points dealt with in that paper, together with this resolution, and to obtain permission for the audience of a deputation for the purpose."

But even though, in my opinion, the time is not yet ripe for England and America to become parties to all The Hague conventions, the time may, nevertheless, *become* ripe. This is the hope I wish to express here, and this leads me to a brief recapitulation of my ideas.

§ 10. *Résumé.* — The significance and scope of the Conferences which have taken place at The Hague so far as concerns other nations may be recapitulated as follows:

I. It has been proved in Europe that the gradual elaboration of rules upon the private conflicts of law, or if one prefers, a code of international private law, by means of treaties,¹ is not an illusion.

Speaking generally, this result of The Hague Conferences is of the highest importance, for it furnishes a noteworthy contrast to the treaty drafts elaborated by the South and Central American states at Lima in 1878 and at Montevideo in 1889.²

II. It is of special importance to note that the only proper procedure was adopted at The Hague; the details of the questions must be approached; and the time of general axioms, the significance of which was for so many centuries held in the foreground, has passed away.

Further endeavors must be characterized by the same specialization of the questions, as has already proved so practical.

III. After four conferences held at The Hague, we are merely at the beginning of our task. It is particularly necessary to cultivate the study of international private law in all countries more thoroughly and in detail than heretofore. A laudable competition should be called forth among the jurists of the whole world. Only thus can the universal uniformity of the rules of conflict be kept seriously in mind. This international "tractandum" must, of course, be approached from the international and universalistic point of view if it is to be properly accomplished.

In order to arrive at a practical result, various dangers must be avoided.

¹ Cf. *Fr. Kahn*, "Die einheitliche Kodifikation des internationalen Privatrechts durch Staatsverträge" (Leipzig, 1904); *Contuzzi*, "Le conferenze di diritto internazionale privato all' Aja" (Napoli, 1904), advances some general views upon the duty of Europe to codify international private law upon the basis of the international conferences held at The Hague (pp. 312-320).

² I have had these treaty drafts reprinted in my publication, "Die Kodifikation des internationalen Civil- und Handelsrechts" (Leipzig, 1891).

IV. The subject must be approached in a systematic and methodical manner, and all hurry and stress should be carefully avoided. There is plenty of time at the disposal of the world's progress.¹ Of course, all progress demands a certain trend toward ideal,² but the attempt to complete a great plan upon the spot usually meets with doubtful success, although, indeed, the Pan-American Congress (held in Mexico, 1901-02), concluded that a code of international private law could be elaborated in the shortest time by a commission of five American and two European jurists.

We may here recall the fact that two historical predecessors of The Hague Conferences remained fruitless, viz., the efforts of the Netherlands in 1874 to call a conference for an understanding upon the execution of foreign civil judgments, and the efforts of Mancini in 1881. From this it is not difficult to deduce that all new structures require that the foundation be carefully prepared, and this has been done particularly by the labors of the Institut de droit international, and in part also by those of the International Law Association.

V. If we are to work toward accomplishing, in the natural tempo of history, universal uniformity in the rules of conflict, it is especially necessary that all nations take a lively interest in international private law; that particularly Anglo-American jurisprudence shall reform its views on certain topics; that England and America shall carefully study and test the questions discussed at The Hague Conferences, in order to determine whether they will participate in them in future.³

In answering this question, the error already made in England should not be repeated. The tendency toward establishing cosmopolitan rules of conflict leaves the national autonomy of each state wholly untouched as regards its substantive private law; in fact, an agreement as to rules of conflict presupposes the existence

¹ Brocher, "Cours de droit international privé suivant les principes consacrés par le droit positif français", II, p. 428, is of the same view when he states: "Il ne faut pas se le dissimuler: les antécédents historiques et la position actuelle de certains États s'opposent longtemps encore à ce que l'unité se fasse d'une manière plus ou moins absolue; c'est un but qu'il faut se proposer d'atteindre sans y mettre trop d'impatience."

² There is no doubt a certain international trend in England, in more recent times, that is much to be approved. Thus, G. G. Phillimore, in the "Journal of the Society of Comparative Legislation" (1904), expresses himself in favor of England joining the international union relating to railroad freight law.

³ I refer to the remarks of *Siméon E. Baldwin* in his article, "Recent Progress towards Agreement on Rules to Prevent a Conflict of Laws", in "Harvard Law Review", April, 1904, p. 404 [and the same author's Chapter XIII in this volume. — Ed.].

of divergent systems of private law. When, therefore, in 1893, England refused to participate in the conferences at The Hague because of the peculiar nature of English private law, it was, in my opinion, the result of an error as to the task and purpose of those conferences.¹

This conception accords also with the reply given by Lord Granville in 1881 to the memorandum of the Italian minister, Mancini, to the effect that an understanding might be arrived at in regard to the following subjects: nationality, mixed marriages, domicile, succession, "droit d'aubaine", and the execution of foreign judgments ("Journal du droit", XIII, 1886).

VI. It is further absolutely necessary that international private law, as an independent branch of law, be methodically taught and studied in all countries, at least at the great universities. In other words, independent professorships should be founded, and in this regard America, with its munificent patrons of universities, can light the way to many of the nations of Europe.²

Of course, as an accompaniment, comparative jurisprudence³ should also receive special attention at the universities.

VII. It would also be practical to establish private or official commissions in the principal countries for the special purpose of studying the subject of international private law, and make proposals for legislation and the conclusion of treaties.

This practice has been followed in France, the Netherlands, Belgium, and Russia, these states being thus inspired by the spirit of The Hague Conferences.

VIII. It is also imperative that officially conducted legal bureaus be created in every country, for the purpose of giving correct information to foreign courts as to the existing private law. Parties, advocates, and judges are frequently in an unfortunate situation because of not knowing where and how to obtain this information

¹ The statement of Councillor Asser at the First Conference (September 12, 1893) seems to me to be sound when he says ("Actes de la Conférence de la Haye," 1893, p. 26): "Nous respecterons la souveraineté et l'autonomie des États. Nous n'aspérons pas à l'unification générale du droit privé. Au contraire, c'est précisément la diversité des lois nationales qui fait sentir la nécessité d'une solution uniforme des conflits internationaux."

"Le programme de cette Conférence est donc, en lui même, un éclatant hommage à l'autonomie nationale."

² I have often referred to this necessity; I did this as early as 1889, in my publication: "Die internationalen Unionen über das Recht der Weltverkehrsanstalten und des geistigen Eigentums" (Leipzig, 1889), p. 77.

³ I may here refer to my publication, "Institutionen der vergleichenden Rechtswissenschaft. Ein Grundriss" (Stuttgart, 1898). I made therein a collection of materials.

— this applies with special force to the Anglo-American sphere of law. In saying this, I nevertheless recognize that the American Academy of Political and Social Science has done good service in propagating the knowledge of foreign laws.

It must be clear to us all that by virtue of the facility of travel from state to state, and from one part of the world to the other, international intercourse is making continual and praiseworthy progress. Both jurisprudence and legislation must keep on a parallel with this condition of things. It is to this tendency that The Hague Conferences owe their existence. The Government of the Netherlands and the promoter of the idea, State-Councillor Asser, of The Hague, are primarily the heralds which have announced the legal demands of the times. And if the nations show their good will, the work begun at The Hague may easily be the starting-point of an important development in jurisprudence. Nothing is so clear as this, that international private law can only be really great, significant, and effective if the rules laid down are recognized in equal degree the world over.

CHAPTER XIII (CONTINUED)

THE HARMONIZATION OF THE RULES FOR CONFLICT
OF LAWSPART II. A COMPARISON
OF THE EUROPEAN AND THE LATIN-AMERICAN
CONFERENCES AND THEIR TENDENCIESBY SIMEON E. BALDWIN¹

§ 1. Methods of Assimilation of Private International Law.		the European Agreements Contrasted.
§ 2. The Latin-American Con- gresses.	§ 5. The Pan-American Con- gresses.	
§ 3. The Hague Conferences.	§ 6. Operation of the Rules in Practice.	
§ 4. The Latin-American and		

Public international law has been sarcastically defined as "a compound of ethics, etiquette, and fraud, administered by armies and navies." If in England and the United States it has ever worn such an appearance, this belied what with them is its real character. In the United States, so far as criminal proceedings are concerned, the Constitution gives in terms to Congress the power to define and punish offenses against the law of nations,² and wherever the Anglo-American common law extends it has made both public and private international law a part of itself, to be administered precisely as municipal law is, by the courts whenever a question turning upon their acknowledged rules may come up for judicial determination.³

But what are these acknowledged rules? To too large an extent they are what the judges, who may be trying a particular case, choose to recognize as generally established and resting on right reason. This is in accordance with the genius of Anglo-American

¹ [Professor of Law in Yale University; formerly Chief Justice of the Supreme Court of Errors of Connecticut, Governor of Connecticut, Delegate of the United States to the Hague Conferences, etc., etc.]

— Ed.]

² See *United States v. Arjona*, 120 U. S., 479, 488.

³ *Triquet v. Bath*, 3 Burr. 1480; *In re Martin*, L. R. Appeal Cases, 1900, Probate, 211; *West Rand Co. v. King*, L. R. 2 K. B. 391; *Moultrie v. Hunt*, 23 N. Y. 394.

law. It is foreign to the spirit of that which is preferred by the civilized world in general. Most nations choose to express their permanent and standing laws through the voice of their legislatures. They publish them in the form of codes, supplemented perhaps by ministerial ordinances. A natural step for them to take next is to publish in like form and by like authority such rules of public and private international law as they may deem worthy of recognition and enforcement. But here the "like authority" is not the legislative or executive power of any single government. International law is for all governments. It ought, therefore, to have the formal approval of all. Hence any official codification will naturally take the form first of a treaty or convention between several nations, owning contiguous territory, or connected by common interests. Such conventions, when ratified by the law-making power in each, will be the act of that power, as fully as if emanating from it in the first instance, and will be virtually a legislative code for each and all of the different signatories.

Beginning with the closing years of the nineteenth century, there have been four marked instances of codification of this description. One, in the field of public international law, embodied in the Conventions agreed to at The Hague in 1899 and 1907, is familiar to all. Three others have attracted less attention, because dealing wholly or mainly with matters of private international law. Of these, two proceeded from Congresses of seven South American States and the other from a Conference of twice that number of European powers.

§ 1. **Method of Assimilation of Private International Law.** — No field of political science is explored with more difficulty than that which belongs to private international law. Public international law has at least some boundaries and monuments that are well known and universally recognized. A common court of arbitral justice for the world has now been set up to administer it. But private international law can hardly look for the establishment of such a tribunal to protect its integrity. Modern government proceeds from the consent of the governed. Nations may agree to contribute to the support, and to respect the judgments, of the Hague Tribunal, because national interests will come before it. Private individuals can become parties to no such agreement. The only legitimate courts for them are those which deal with private rights, and are part of a government established by a particular people for their own good. It is only rights enforceable in such courts with which private international law has to do.

It is, nevertheless, a branch of science, and of a science which, above all others, is important to mankind. Its scientific character requires that it should deal with universal conceptions and deal with them in a settled form and order. This it is theoretically possible to achieve in two ways.

1. There may be a common agreement on certain rules of judgment to be applied in all courts throughout the world in the disposition of all controversies of a similar nature as to matters of private international law.

2. There may be a common agreement to determine which of two or more differing rules of judgment shall govern the disposition of certain controversies as to matters of private international law, according to their particular nature and origin, as the case may be.

In other words, private international law either may seek to lay down universal rules which are the same in every country, or, acknowledging that this is impossible, may content itself by determining which of several conflicting rules, each having the sanction of a particular nation, shall be applied in giving remedial relief under the particular circumstances of a particular class of causes.

The idealist will think the former of these methods the only one deserving the name of scientific. The opportunist will be ready to accept the other, at least for the present stage of the progress of the world; remembering that the principle of accommodation is yet a principle.

§ 2. **The Latin-American Congresses.** — Of the three efforts in recent years to advance private international law which have been described as made in different quarters of the globe, two were inspired by a primary, though not unlimited, devotion to the first method; the other moved on the lines of the second.

On December 9, 1877, there met in Lima a diplomatic Congress of Plenipotentiaries from seven South American and Central American states, to consider the expediency of promoting uniformity of legislation in each and of preparing an official codification of the International Private Law of the continent. Peru issued the call for the assembly, in the belief that such action might pave the way for a solid and durable confederation of all South America and Central America under one republican form of government. Seven states were represented, Argentina, Bolivia, Chili, Costa Rica, Ecuador, Peru, and Venezuela. It will be observed that this list includes only one Central American state, and does not embrace Brazil. All the delegates were trained jurists.

The Congress of Lima gave a year to their work, adopting on November 9, 1878, "ad referendum", a convention establishing uniform rules on many points of international private law, and later, on March 27, 1879, another regulating extradition.¹

The fundamental principle marking the former was that, in the matter of personal status and juridical capacity, the law of one's nationality was to control everywhere (Title I, Art. 2). Here was the great rock on which this Congress foundered. This convention was not ratified by the signatory powers, but it deserves special notice as the first successful attempt made in the history of the world to codify international private law by the instrumentality of a diplomatic conference.

Of unsuccessful attempts there had been two.

In 1874 the Netherlands had proposed to all the European powers an international conference on the subject of the execution of foreign judgments. Italy, Belgium, Russia, Austria, Denmark, and Sweden signified their approbation of the scheme. France made no answer, Great Britain and Norway declined to adhere to it; and the project was dropped.

In 1881 and 1882, Italy opened a correspondence with the governments of Europe and America, with a view to agreeing on conventional rules of international private law and particularly of such as would bear on the enforcement of foreign judgments. The replies were so favorable that on March 19, 1884, she issued a formal call for a conference on these subjects and a consideration of the feasibility of a general codification of international private law. It was to meet at Rome in November, 1885.

Fourteen European and seven American Powers accepted the invitation. A suitable program was prepared by Italy, but at the time set there was an epidemic of cholera there which rendered the proposed meeting unsafe, and the final abandonment of the whole matter was the result.

South America now began an independent movement.

On March 1, 1888, Uruguay invited the assembling, at Montevideo, in the following August, of delegates from the South American states, to devise and set up uniform rules of international private law, and thus to help avoid such conflicts of laws as might prejudice the free development of their reciprocal relations. Argentina took similar, but separate action. The Congress met accordingly, and was composed of four of those states

¹ *Manuel Torres y Campos*, "Bases de una Legislación sobre Extraterritorialidad", 215.

represented at Lima, and three others. Argentina, Bolivia, Chili, and Peru participated in both: the three new powers at Montevideo were Brazil, Paraguay, and Uruguay. Central America did not participate and was not asked to.

The Congress of Montevideo sat until the following February, and approved eight draft treaties on the following subjects: civil law, commercial law, penal law, the law of procedure, literary and artistic property, trade-marks, patents, and the exercise of the liberal professions. An additional protocol was also agreed on, containing various special provisions as to the application of the laws of each of the contracting parties in the territories of the rest. These projects were approved "ad referendum", there being still required in the case of each of them, in order to give it effect in and between any of the powers, ratification first by the legislative department of each, and then by the department of government charged with the management of foreign relations.¹

Each treaty contained provisions looking to the adhesion to it of nations not invited to the Congress, as well as of the three which were invited, but did not send delegates. These provisions were not very clearly worded, but as explained by the terms of the final protocol seem to authorize (at least upon the invitation of the Argentine Republic and Uruguay), the adhesion of any power to any of the treaties, provided, and provided only, such adhesion should be acceptable to each of the powers which had participated in the Congress, and which might subsequently ratify the treaty in question.

In fact, communications were sent by the Argentine Republic and Uruguay to other powers, outside of South America, inviting their adhesion.² Spain was one of these, and on November 9, 1893, through her department of foreign affairs, signified to Uruguay her acceptance "ad referendum" of this invitation.³ Spain, France, Italy, and Belgium afterwards fully acceded to the copy-right treaty.⁴

The parliamentary action necessary to make the treaties operative, up to December 11, 1894, had been had in four countries, Uruguay, Peru, Paraguay, and the Argentine Republic; such

¹ *Torres y Campos*, "Bases de una Legislación sobre Extraterritorialidad", 221.

² "Reports", etc., of the International American Conference of 1889, 568.

³ *Torres y Campos*, *op. cit.*, 338. The necessary action by the Cortes has not been secured, and probably never will be.

⁴ "Am. Journal of Int. Law", III, 303.

ratifications on the part of each having been given in the order named. Ecuador followed in 1902; Bolivia and Colombia in 1903.¹ Chili refused to ratify at least two of them, those on Penal Law and Civil Law.² Brazil declined to ratify the latter.³ Guatemala, in 1903, approved those on procedure, copyrights, trademarks, and patents.⁴

§ 3. **The Hague Conferences.** — It was now time for Europe to take its turn.

The four Conferences of The Hague for the advancement of International Private Law were initiated by the Netherlands in 1892, by which government the subjects for consideration at each of them were carefully restricted and defined. At the first, held in 1893, official delegates were present from the Netherlands, Germany, Austria-Hungary, Belgium, Denmark, Spain, France, Italy, Luxembourg, Portugal, Roumania, Russia, and Switzerland. At the second and third, held respectively in 1894 and 1900, these powers were again represented, and also Sweden and Norway. At the fourth, held in 1904, a delegate was present from Japan, and signed the final protocol.

The Conference of 1893 agreed upon tentative projects of laws or treaties, on four subjects: the constitution of marriage; the transmission and authentication of documents; commissions for taking testimony; and successions. The Second Conference (1894) reconsidered these, and agreed on a protocol for submitting to the several powers represented a project for rules on six subjects: the constitution and effects of marriage; divorce and separation; guardianships; civil procedure, embracing the points covered by the second and third projects of the preceding year; bankruptcies; and successions. In most of the countries taking part in these Conferences, parliamentary ratification is required before any such convention can become operative. In 1899 (April 27), such action having been secured wherever it was necessary, the convention as to civil procedure went into effect between all the powers, subject to a reservation by Italy on a single point (the "*cautio judicatum solvi*").⁵

¹ Doc. No. 310, 57th Congress, 2d Session, 804; Doc. No. 458, 58th Congress, 2d session, 559.

² "Reports", etc., of the International American Conference, 596, 907.

³ "Annuaire de Législation Étrangère", 1890, 1003.

⁴ House Doc. No. 310, 57th Congress, 2d session, 840.

⁵ "Actes de la Troisième Conférence de la Haye, pour le Droit International Privé", 78.

At the Third Conference, held in 1900, the other conventions were reconsidered and revised, and draft conventions agreed to by twelve of the powers represented,¹ on four subjects: the constitution of marriage; divorce and separation; guardianship; and successions. Of these, the conventions as to the constitution of marriage, divorce and separation, and guardianship received parliamentary approval in seven countries, being a majority of those which had given their consent at the Conference, and went into full effect in 1904 (August 1),² as between these powers, namely, Germany, France, Sweden, Holland, Belgium, Roumania, and Luxembourg. Spain joined them a few weeks later, and Switzerland and Italy in July, 1905.³

By the Fourth Conference (1904) certain amendments were recommended in the convention on civil procedure, and revised conventions adopted on four subjects: the relations between husband and wife, established by marriage; bankruptcies; successions; and lunatics.⁴

§ 4. **The Latin-American and the European Agreements Contrasted.** — We have, then, an agreement fully established between six nations of South America for regulating most questions of private international law that can arise in their courts. We have also an agreement, established in 1899, between fourteen European nations for regulating as to their judicial tribunals the proof of foreign documents; the execution of rogatory commissions (by which the courts of one country render assistance to those of another); suits by foreigners "in forma pauperis"; and the arrest of foreigners on civil process; and also an agreement between all but one of these nations that foreigners may sue without giving any security to the defendant for his costs of suit, whenever none is required from native citizens, but that any judgment for costs against the plaintiff in such a suit may be enforced (*i.e.*, rendered "exécutoire") in any of the countries which are parties to the convention. We have further an agreement, established in 1904 and 1905, between ten European nations for regulating most questions of private international law that can arise in their courts concerning the constitution of marriage; divorce and separation

¹ I count Sweden as one of the powers, and not Norway.

² "Mitteilungen der Internationalen Vereinigung für vergleichende Rechtswissenschaft", etc., for 1905 (No. 24), 477.

³ "Journal du Droit Int. Privé", 1905, 797, 1151. These conventions are printed in the Appendix to the "Report of the Proceedings of the Universal Congress of Lawyers and Jurists", held at St. Louis in 1904.

⁴ "Actes de la Quatrième Conférence de la Haye pour le Droit International Privé," 224.

after marriage; and guardianships. It seems probable that Austro-Hungary and Portugal will also give their adhesion to it.¹

The South American conventions are to remain in force indefinitely, subject to the right of any signatory power to withdraw on two years' notice. Each of the European conventions runs till the end of five years from the date when a majority of the powers, agreeing to its proposition, made a formal deposit of their respective ratifications at The Hague; ² but at the expiration of that time it is to be deemed to be tacitly renewed from five years to five years, subject to denunciation by any power, on six months' notice, as to its own obligations under it. In this way The Hague convention as to civil procedure is now in force for its third term.

Let us now ask, What are the main differences between the work of the Congress of Montevideo and that of the Conferences at The Hague?

The former had more ambitious aims.

It commenced its labors under the inspiration of a draft for a general code of private international law, prepared by Dr. D. Gonzalo Ramirez, the minister of Uruguay at Buenos Aires, at whose instance Uruguay and the Argentine Republic had been induced to call it together.³ The Ramirez Code consisted of 101 Articles, followed by a commentary justifying the principles upon which it was framed. It was originally prepared as the basis of a treaty between Uruguay and the Argentine Republic only, but made for itself a wider sphere. This draft was based on the principle that to claim the benefit of private law is a right of humanity, and the common patrimony of all men.⁴ Nationality, therefore, it was argued, rules political, but not civil rights. The Congress of Jurisconsults at Lima in 1877 had proceeded on another theory. It had accepted nationality as the criterion of personal status and capacity. The code which it proposed had, therefore, fallen by the way. Modern European jurists were indeed treading in the same path. They were for making the civil laws as to a man's juridical relations follow his national law, wherever he might go, as well in regard to his purely personal relations as to those affecting his property, even if situated in a foreign territory. But this was

¹ "Proceedings of the Universal Congress of Lawyers and Jurists at St. Louis", 145.

² As it was to take effect sixty days after such deposit, it could only run for four years and ten months, as respects its first term.

³ *Torres y Campos, op. cit.*, 208, 219: "International American Conference Reports", etc., 74.

⁴ Cf. Art. 8 of the Italian Civil Code; and *Fiore*, "Droit Int. Privé", I, § 104.

opposed to the doctrine of Anglo-American jurisprudence and to the spirit of the South American constitutions.

At the first Conference at The Hague in 1893, on the other hand, the original memorandum submitted by the government of the Netherlands to the delegates had a much more restricted scope. It referred to the work of the Congress of Montevideo as more comprehensive than that which they at The Hague were invited to undertake. This was simply, at the outset, to endeavor to reach an agreement on certain general principles in respect to a few selected subjects. The opening address of the President (the late Dr. T. M. C. Asser) set forth this as the proper aim of the Conference with great plainness. We shall not, he said, aspire to the general unification of private law. On the contrary, it is precisely the diversity of national laws which makes the necessity felt of a uniform solution of international conflicts. "Unification is neither possible nor desirable, save for certain kinds of laws of a character essentially cosmopolitan."

The Conferences at The Hague all proceeded on the lines thus indicated, and there was scarcely an allusion to the South American conventions in any of their discussions or reports. The space under command will serve to note but a few of the differences in the conclusions of these bodies.

By the Hague conventions personal status generally follows nationality. By the Montevideo conventions, it generally follows domicile. It is needless to remark that, so far as this difference is concerned, the latter accords better with the principles of Anglo-American law. It may, however, well be doubted if those principles are in their nature permanent. The political, like the economic tendencies of our times, set strongly towards consolidation and centralization. Italy has pressed the rule of nationality as against that of domicile, because she was busy in creating a nation with a strong central authority. Germany has followed her lead from a similar cause. The waning of the power of our own individual States, as the people of the United States are becoming more closely knitted together by the bonds of commercial intercourse and the pressure of world-politics, makes in the same direction. So, for Great Britain, does the rapid extension of her imperial policy.

But the Montevideo conventions are not altogether consistent in this respect. Take, for instance, the provisions as to the constitution of marriage. Title IV of the treaty on International Civil Law relates to Marriage and Divorce, and seeks to cover the

entire field in three brief Articles. By Article II, which treats of the constitution of marriage, the capacity to contract it, as well as its formalities, continuance, and validity are to be governed by the law of the place where the contract is entered into; saving only exceptions from want of age, near relationship, prior subsisting marriage, and the killing by either party of one to whom the other had been previously married, in order to free the latter from the bond of matrimony. Here the "*lex domicilii*" plays no part, nor does nationality. Article 13, however, provides that the law of the matrimonial domicile shall govern as to the legal separation of the couple, and as to divorce, provided the grounds of divorce be sufficient under the law of the place where the marriage took place.

The Hague convention on the constitution of marriage alone covers eight Articles. While it agrees with the Montevideo convention in letting the "*lex loci celebrationis*" regulate the form of marriage, it saves the rights (1) of the nation to which the parties belong, to refuse to recognize it, unless the requirements of its own laws have been also observed, and (2) of all nations to recognize it if, though null in the place of celebration, it was solemnized in a form sufficient by the national laws to which each party was subject. It also recognizes marriages of foreigners according to the forms of their own law, at a legation or consulate, in a country that makes no opposition. Nor can such opposition be of avail if founded on the insufficiency of a previous divorce of one of the parties, or on ecclesiastical vows. On the other hand, if the law of the nation to which the parties belong forbids their marriage on purely religious grounds, but the "*lex loci celebrationis*" nevertheless permits it, the marriage will be good there, and in such other of the signatory powers as may choose to recognize it. What their national law is, parties intending marriage are bound first to prove to the satisfaction of the authorities of the place of celebration.

In contrast with the single Article which has been described in the Montevideo convention regulating divorce and separation, one of the Hague conventions is entirely devoted to the subject. It contains nine Articles, and follows the former in requiring grounds for a divorce which are recognized as sufficient by the law of more than one country. The Montevideo convention calls for grounds so recognized both by the law of the matrimonial domicile and by that of the place where the marriage took place. The Hague convention calls for grounds recognized both by the "*lex fori*" and by that of the nation or nations to which the parties belong, unless

the former treats the authority of the latter alone as sufficient. The ignoring of the "lex fori" which marks the Montevideo convention seems plainly an element of weakness. To dissolve a relation of such social importance as that of marriage is what no state should be called upon to do, unless its own law justifies such relief under similar circumstances.

The great and vital distinction between the Montevideo and the Hague conventions is that the former aims at dealing shortly with universals, while the latter is content to deal specifically with particulars.

§ 5. **The Pan-American Congresses.** — The Latin-American love for legal generalization showed itself even more strongly in the convention adopted by the Second Pan-American Congress at Mexico in 1902, looking to the immediate and complete codification of both public and private international law by a commission of five American and two European jurists.¹ Brazil was the first to propose this, and the Bolivian parliament ratified the convention in 1903.² Honduras did the same, but no other powers gave their adhesion to it, and the convention therefore lapsed.

The First Pan-American Congress, held in Washington from October 2, 1889, to April 19, 1890, had before it for special consideration the various Montevideo conventions. These, as already stated, had then been ratified by only a few powers. The Congress contented itself with recommending the adhesion by every American power to those on literary and artistic property, on patents, and on trade-marks,³ and their careful study of the rest, so far as they had not already ratified them, with a view to concluding, within the following year, whether to approve them or not, and if to approve, whether it be with or without modifications.

The proposition of the Second Pan-American Congress of Mexico having failed of ratification, it was renewed as respects American international law by the Third Pan-American Congress, held at Rio de Janeiro in 1906, and a convention to put it in effect adopted, which has been ratified by fourteen Powers. Two commissions were created, one to codify American Public International Law, and the other to codify American International Private Law.

At the Fourth Pan-American Congress, held at Buenos Aires in 1910, these committees reported progress. Detailed codes had in fact been prepared, but had not been sufficiently studied to justify

¹ Senate Doc. 330, 57th Congress, 1st session, 203; Report of the Proceedings of the Congress, Mexico, 1902, 147.

² Doc. 458, 58th Congress, 2d session, 559.

³ Report of the Conference, II, 569, 582.

a recommendation for their adoption. The prevailing sentiment was for advancing cautiously, and was well expressed by the President of the Congress, Señor Nabuco, in his inaugural address. "To us," he said, "it seems that the great object of these conferences should be to express collectively what is already understood to be unanimous; to unite, in the interval between one and another, what may have already completely ripened in the opinion of the continent; and to impart to it the power resulting from an accord amongst all American nations. This method may appear slow, but I believe it to be the only efficacious one, the only way of not killing at its inception an institution which is worthy of enduring throughout the centuries."¹

This Congress agreed on conventions as to patents; designs and industrial models; and the collection of private debts by governments from governments. The latter was ratified by the United States in 1914. At the preceding Congress (the third), a convention was adopted, "ad referendum", to regulate the position of naturalized aliens who return to reside in their original country. This has been ratified by Brazil.

A fifth Pan-American Congress is scheduled to meet at Santiago, Chili, November 29, 1915, when a further report is expected as to the proposed codifications of American international law.

§ 6. **Operation of the Rules in Practice.** — What has been the practical working of such of the international conventions as have been ratified and gone into effect? It may be said to have been generally satisfactory.

Those of American origin would seem to have been less carefully thought out than those prepared at the Hague. They are more general in terms, and more ambitious in design. Universal propositions are apt to require universal exceptions. The general protocol which closed the list of the Montevideo conventions provides (Art. IV) that the laws of other States shall never be enforced as against the political institutions, police regulations, or customs entering into the "lex fori." This opens a wide door of relief from affirmations of general principles, the application of which might be found inconvenient in practice.

The South American courts, in expounding these conventions, have been inclined to give full force to all their exceptions and limitations, even if they have not added to them by construction.

The New York Life Insurance Company Case. — A lawyer in Buenos Aires, Señor Lamarca, retained by the New York Life

¹ "Am. Journal of Int. Law", III, 968.

Insurance Company to defend a suit upon a policy, satisfied himself that it had been fraudulently issued, and through improper and criminal practice on the part of a certain insurance solicitor in Montevideo, named Castro. Thereupon he filed a complaint in a criminal court in the latter city, as attorney for the company, charging Castro with this offense. By the law of Uruguay, no lawyer can act for a client as attorney of record without a written power of attorney. Señor Lamarca had none authorizing him to institute such a prosecution, nor was the company aware of his action in this respect. Señor Castro made defense and was acquitted. He then procured the institution against his accusers, including the New York Life Insurance Company among them, of civil and penal actions, demanding f.250,000 damages for the injury which had been done him by their false charges. Uruguay follows the European practice of allowing a demand for damages in favor of the party injured by an offense to be joined with a criminal complaint.¹ An appearance was entered for the company in defense to the claim for damages, but again without any written power of attorney. Judgment was rendered in December, 1900, condemning Señor Lamarca to six months' imprisonment, and declaring the company liable for such damages as might be assessed by arbitrators according to law. They were then assessed by arbitrators, as is the practice there, after hearing the company (which then appeared by an attorney holding a written power), at the full amount claimed, with costs, including counsel fees.

The company had a branch office in Montevideo. Payment of the judgment having been refused there, proceedings in insolvency were instituted against it, and a decree of adjudication obtained, notwithstanding a law which provided that such proceedings could only be brought by one holding a commercial obligation. Señor Castro then made over his claim to a syndicate, which undertook its enforcement for its own profit. By the treaty of Montevideo as to procedure, judgments and awards of arbitrators in civil and commercial matters, rendered in one of the signatory powers, have in the territory of any other the same force as in the territory of the former, provided they were (*a*) rendered by a tribunal competent under the principles of international law ("dans l'ordre international"); (*b*) were final; (*c*) the defendant having been legally summoned, or represented, or regularly declared in default; and (*d*) were not contrary to the laws of public order in the country where their enforcement might be sought. Article IX required

¹ See the French Code d'Instruction Criminelle, Arts. 6, 358, etc.

the due execution of rogatory commissions for the performance of any acts required by any of the treaty provisions. The companion treaty as to international commercial law provided that one might be adjudged an insolvent wherever he had a commercial domicile, though incidentally carrying on business in any other nation, or maintaining agencies or branch offices there which did business on the account and credit of the principal house; and if there should be two or more independent commercial houses in different countries, the courts of each were to have jurisdiction in insolvency over the house maintained there.

The syndicate, relying on these treaties, asked and obtained rogatory commissions from the judges of Uruguay to those of the Argentine Republic for the institution of three suits; one to sequester the property of the company's branch office at Buenos Aires; the second to sequester a public deposit of securities which it had made there with the government for the protection of creditors; the third, to compel payment by the branch office of counsel fees, amounting to 30,000 piastres, taxed against the company in the Montevideo judgment. The two commissions first named were presented to the court of commerce of Buenos Aires, which responded by issuing writs of sequestration founded on the Montevideo adjudication in insolvency, both against the local branch office and the public deposits. The third commission was presented to one of the Federal Judges, who declined to interfere for the enforcement of the judgment for counsel fees, on the ground that the treaty had no reference to judgments rendered in the course of any criminal proceeding. This ruling was affirmed on appeal, but appeals from the judgments of the court of commerce were sustained, the higher courts holding that the only commercial domicile of the insurance company was in New York; its branch offices in Montevideo and Buenos Aires being simply agencies and not independent commercial houses.

By thus looking into the foundations of the Uruguayan judgments, the Argentine courts read into the treaty of Montevideo a rule that a judgment rendered in one of the signatory governments could only be enforced in another by virtue of an order from a judicial tribunal of the latter, in the nature of an exequatur or a decree of homologation.¹ It would seem that the award of \$1,250,000 against the insurance company must have been grossly exces-

¹ See a discussion by Professor *E. S. Zeballos*, of the University of Buenos Aires, in the "*Bulletin Argentin de Droit International Privé*", I, 341.

sive. Nevertheless it was made in a proceeding to which the company was regularly a party, and in which it had been duly heard. The rogatory commissions seeking its enforcement were also regularly issued. The treaty of Montevideo, taken literally, would seem to entitle the syndicate to collect its judgments by the aid of the Argentine courts. But the mode of collection pursued was through proceedings in insolvency, and here a jurisdictional question fairly arose. If the company had no commercial domicile in Uruguay, the courts of that country had no power to adjudge it an insolvent debtor. The Hague Conferences provided in their convention as to insolvency procedure, that an adjudication in insolvency in one of the contracting nations could not be enforced in another without a formal exequatur, and set out in particular what must be shown to obtain one. The conditions of the exequatur which the ruling of the Argentine courts requires are necessarily left to be settled by the general principles of jurisprudence recognized in the country from whose courts the enforcement of the judgment is sought. Only such of those principles as seem essential to international justice should be applied.

It is worthy of remark that several years after her adhesion to the treaty of Montevideo, the Argentine Republic (May 29, 1901), concluded a treaty with Italy as to rogatory commissions and foreign judgments, much more on the lines of the Hague Convention. By this, judgments of the courts of either power are to be enforced in the other only upon an exequatur, to be granted if, and only if, (1) the court was one of competent jurisdiction; (2) the parties were properly cited, or voluntarily appeared; and (3) the judgment rested on a personal obligation, or one not contrary to the law or inimical to the public order of the nation where the exequatur is sought.¹

Other Cases. — Another illustrative case arose out of the Hague convention as to Divorce. This has been ratified by twelve Powers, of which Italy was one; and her courts have decided that foreign divorces, granted under the conditions prescribed in that convention in one of the countries that are parties to it, cannot be deemed inconsistent either with the public law of Italy, or with her principles of public order and good morals.

As showing the importance of the Hague convention as to guardianships, a romantic suit may be mentioned, decided in 1908 by the Civil Tribunal of the Seine, in France. A French couple on a visit to Germany took a fancy to a little girl of German parentage,

¹ "Blätter für vergleichende Rechtswissenschaft", etc., April, 1913, 31.

adopted her, brought her to France, and brought her up there, as if she were their own child. The girl was illegitimate. Her mother, who had gladly given her away in adoption, after some years married, and told her husband the whole story. He was so magnanimous as to determine to take the child under his own care, and procured the appointment of a guardian by the proper German court. A contest ensued between him and the survivor of the French adopting parents, at their domicil and that of the child in France. The decision was that as the Hague convention, to which both nations were parties, declared that the guardianship of a minor was regulated by the law of his nation, the German judgment was conclusive in France. It was therefore ordered that it be made executory and the custody of the child handed over to the German guardian.¹

§ 7. **Present Tendencies of Principle.** — I listened with great interest to the paper of my late distinguished friend, Professor Friedrich Meili, when read at the St. Louis Exposition. With regard to the concluding part of his paper, concerning the prospects of Anglo-American concurrence in conventions upon the present subject, I offer the following views :

The subject of the conflict of laws is of especial importance to the Bar and the Bench of the United States, where there are forty-eight different sovereignties, each with full local jurisdiction and equal in autonomy — subject, to be sure, in national affairs, to another sovereignty, but subject to it in national affairs only.

It takes at least the space of a generation for any great advance in international relations to become fully established. In 1874, the Netherlands proposed in vain to the powers of Europe the convocation of a conference to establish a judicial union between them under which the courts and governments of each should recognize a personal status acquired in any other, and under which rules should be framed for the enforcement of foreign judgments. In 1904, the Netherlands had the happiness of seeing the results thus aimed at largely achieved. England was approached by that Government with an invitation to join in the first of these Hague conferences in 1893, but declined. Her government felt that the substratum of her laws and her judicial system differed too widely from that of Continental Europe to warrant her adhesion to the movement ; and if the United States had received a similar invitation, it would probably have been declined for similar reasons, especially in view of our constitutional limitations.

¹ *Feckinhaus v. Pedrier*, "Nouvelle Revue pratique de Droit International", for 1909, 69.

The Anglo-American distinction between real and personal property is so deeply rooted that anything calculated to unsettle it must be looked upon by the English and American bar with some distrust, if not disfavor. But is it not evident that, on principle, this distinction has long ceased to occupy its original position? The day has passed away when a man or family was known by the land on which they had their home, and when it was the tenure of that land which measured a man's main rights as a citizen, or as a ruler. How many families in countries recognizing a hereditary and landed aristocracy are to-day the owners of the estate from which they originally derived their names? The proudest house in Europe, the House of Hapsburg, if it sought its original ancestral domain, would find it in the hands of strangers, in the canton of Neuchâtel, in the Swiss Republic. The political reasons for controlling succession to land by the laws of the country in which it lies are also no longer what they were. Its ownership gives few and continually fewer political rights. Its economic significance as a form of capital is steadily declining. It has been replaced in this respect by the modern private corporation. Great and small fortunes, alike, we all know, are largely, if not mainly, made up of corporate securities, not land. Let the American or English lawyer once bring himself to recognize the fact that, except as a subject of taxation, land considered as private property now stands to the government in no relation different in kind from that borne by property of any other description, and he will find it not difficult to look upon the settlement of successions and bankruptcies and the management of guardianships from the standpoint of Continental Europe.

A more serious difficulty, perhaps, is that Anglo-American law centers all that pertains to the civil status of the individual in his home, that is, in his domicile, and does not test it by his nationality. When, as a hundred years ago, here and everywhere, nationality was unchangeable except by the express consent of the sovereign, there was a reason for preferring domicile. That could be freely chosen; but now nationality can be. The old maxim, "*nemo patriam in qua natus est exuere nec ligeantiae debitum ejurare possit*", has perished; and has perished largely by the efforts of statesmen and the provisions of treaties during the last generation. This removes one great objection to domicile, and founds a new argument in favor of nationality, as a test of property rights and property succession. On the other hand, in some countries, and especially in the United States, it adds another objection against

the criterion of nationality. The emigration of foreigners into the United States, with the purpose of settling here, either temporarily or permanently, is immense and under ordinary conditions increasing. Naturalization, if they wish it, cannot be had for five years. Meanwhile, they may acquire a domicile. If they die during that time, or if they marry during that time, or a great change in their property relations occurs, it might be awkward for American courts to search out and apply a foreign law to determine the questions that arise if governed by the law of their original nationality.

There are many, however, who do not think that these difficulties arising out of a choice of nationality rather than domicile, by the Hague Conferences, as the test of personal status, and the distinction between land and other property so peculiar to England and America, are fatal necessarily to their acceptance of the principles of these Hague Conferences; and it is to be hoped that in future conferences of this character the invitations of the powers extending them may not be limited to a single continent.

It is international conferences like these that are bringing the civilized world together in matters of governmental regulation. They are not called to deal with great generalities, but with practical questions of present importance. They have to do with particulars rather than with universal propositions, and in legal reform or legal statement to attempt everything is to fail in everything.

Constitutional limitations in the United States have an important bearing on any project for regulating by treaty matters of international private law. The United States, as a nation, can hardly, under present conditions, so far change their political traditions as to extend the treaty power to a concert of legislation on matters of such a character, which are purely local in their nature, with nations on other continents. The States, acting individually, could not become parties to such a concert among themselves and foreign Powers, for it is expressly forbidden by the Constitution of the United States. They can, with the consent of Congress, agree among themselves to establish similar conventions, and they can, without that consent, change, each for itself, their laws so as to bring them into closer accord on these subjects or on any other. They have been doing this for many years through the annual Conference of Commissioners on Uniform State Legislation, in which most of our States and Territories are now represented, and which gave encouragement to the Government of the Nether-

lands to call these various international conferences held at the Hague of which mention has been made.

But it is as easy to repeal as to enact. There is, therefore, no assurance of stability to the beginnings of uniform legislation which have been made, at the instance of these Conferences or of the American Bar Association, by the several States.

In this respect the powers of Europe occupy a position much more favorable to permanence of policy. Each of these Hague treaties or conventions was, by its terms, to remain in force for five years, and then be tacitly considered as renewed unless explicitly denounced and terminated. All of them have been recognized not only by the executive, but by the legislative departments of at least seven European states, and must eventually, to have full effect, be ratified by the legislatures of most of the rest. This gives them additional assurance of stability. But stability is best guaranteed by the intrinsic character of these treaties themselves. They have not attempted too much. They have not aimed at the establishment of uniform laws in respect to the family, but uniform rules for applying the family law of particular states; — not, for instance, that marriage shall be celebrated in accordance with the laws of any one state at all times, but that marriage between those who are citizens of a certain state may be celebrated in accordance with the laws of that state, wherever that celebration may occur.

The design of the Hague treaties, then, is simply to prevent a conflict between the laws of one country and those of others on the same subject, by determining, in advance, by means of general regulations, which shall govern, if the case turning on them comes before the courts. Each country may think its own laws the best, and yet each may, without any inconsistency, agree to let foreigners in certain cases be subject to foreign rules, with which they may be expected to be more familiar. It is this spirit of moderation, this contentment with comparatively slight advances, which is so striking a feature of the work of the four Hague Conferences, and it is this that carries with it the surest promise that their results will endure.¹

¹ See a partial bibliography, prepared by the writer in 1904, of what had been printed in reference to the Hague Conferences for regulating different matters of Private International Law, which will be found in Appendix B of the "Official Report of the Universal Congress of Lawyers and Jurists" at St. Louis in 1904; and a paper on "The International Congresses and Conferences of the Last Century as Forces working toward the Solidarity of the World", in the "American Journal of International Law", I, 565.

CHAPTER XIV

A WORLD COMMON LAW:
ITS NEED, ITS SCOPE, AND ITS PROSPECTS

A SYMPOSIUM

I. THE NECESSARY DIVERSITY OF LAW, ACCORDING TO
RACES AND NATIONSBY EDMOND PICARD¹

§ 1. **The Utopia of an Universal Uniform Law.** — The union of terrestrial humanity, of a billion and a half souls, into a single homogeneous whole, either of religion, of language, of art, or of law, is in all likelihood an Utopia; and were it forced upon us, it would be a climax of artificiality, of despotism, and of fragility.

Like morals, religion, art, politics, so law has strangely suffered, and still suffers, from that mania for uniformity which would have everything alike, — a world rendered intensely monotonous by the destruction of all the noble diversities which make life so moving and fascinating a spectacle. Happily, a more discerning, and hence a more exact view, of the activity and evolution of peoples is beginning to discredit this strange obscurantism, this geometric and jacobean systematization. It is becoming rather common to regard it as a marked aberration to aspire to subject all our poor humanity to a single system of law, and to suppose that any disciplinary or foolishly paternal régime of instruction would succeed in taking from races and peoples those attributes that constitute their originality and at the same time their beauty and attraction.

¹ [This author is a Senator of Belgium, Professor of Law in the New University of Brussels, and former President of the Bar of the Belgian Supreme Court.

The essay (of which the introductory paragraphs are here omitted) appeared originally in the "Journal du droit international privé et de la jurisprudence comparée" (Clunet), 1901, Vol. 28, p. 417. Its substance, and in part its text, has since been reprinted in the author's "Le droit pur" (Paris, Flammarion, 1910, §§ 141-144), — a brilliant discourse, of concise encyclopedic scope, much discussed in all recent French writings on the philosophy of law. — Ep.]

§ 2. **Ethnical Differences are Permanent.** — In law, as in all the other great forces directing the activities of the ethnical races into which the earth is divided, and in their subdivisions, the nations (simple historical varieties of these fundamental, natural, and original groups), differences have always been apparent, based upon diversity of mentality. A recent science, the psychology of peoples, already rich in curious and important data, has as its object the study and explanation of these varieties. They are at bottom very evident and simple, so soon as we become accustomed to observing them. They have so long suffered a disastrous and sentimental obscurity, because of the false and childish doctrine of the unity of the human race, both as to certain somatological and mental elements, and also as to all of its almost infinite detail.

The race (we are in the best position to understand this) is the controlling factor in the aspects which human activities assume in their various realizations. As yet this idea scarcely begins to be current among Europeo-American nations. The truth has been veiled from them, on the one hand by the childish conception of the unity of our first progenitors, accepted by Christianity; on the other hand, and no less obstinately, by the pretension of the unity of the human race so dear to sentimental ideologists.

It is scarcely any longer necessary to combat the Biblical fable of the two human beings modeled by Jehovah in the Garden of Eden. This puerile monogenism has been discarded by science. One must be unusually behind one's age not to admit that groups of human beings, possessing fundamental physical and especially psychical differences, gradually made their appearance upon the earth, in primitive ages, at different times and places, and under varied influences. This theory of polygenism ruins at one stroke, too, the gentle dream of those who maintain that all individualities of race are interchangeable, and that to argue to the contrary would be in defiance of the "Rights of Man and of the Citizen."

From polygenism resulted ethnical aggregates or groups, going back to exceedingly remote origins, possessing a common human foundation, but essentially and unalterably different in a multitude of intellectual conceptions, notably those of law and justice. Within the sphere of these conceptions they borrow nothing durable from one another. They are like different flora, unlike, and evolving from original types, ever in close relation with their physiological and cerebral nature. Probably some groups have already disappeared; others are in process of disappearing; for example, the American Indian, the native Australian, and the Hyperborean.

There are but a small number of the latter; of the former there are millions.

We must not confuse the historical races (that is to say, the groups which have been formed by events) with the great natural races. None of the latter is founded upon accidental circumstances. "Res nata, non facta!" They are supernatural. They exist in a parallel manner to zoölogical groups and with the same persistence, subject to no definite term of existence, and undergoing modifications only throughout periods of time, so long that they exceed all conceivable measurement and the limits within which our activities are exercised. The races of the earth are as unchangeable as the mountain ranges.

§ 3. **Legal Growth Due to Racial Forces.** — Diversity of race of necessity influences the genesis of law through the ages. In law, as elsewhere, we must know and search the heart of the race, feel its beat, listen to it; if we do not, our labor is an untruth, a superficiality, a travesty. Law, said Aristotle, is not like fire, which burns similarly amongst the Persians and amongst the Greeks. In its varied external manifestations law is an ethical instinct, a function of the soul. If, as we may believe, this instinct acts in us, deluding and tricking us into the belief that we enjoy freedom of the will, we should not say: "I think juridically," but "It is thinking juridically in me," just as we say, "It is raining," or, "It is turning up cool this morning." Each of us must resign ourselves, perhaps, to the admission that a thought comes when It wills and not when we will; and instead of enduring this fact regretfully, we should be happy and interested in it as in one of the most curious of all phenomena. We do not inveigh against the orbits of the planets or against the rhythmical movement of the tides. We must watch the flow of the law as we would gaze upon that of the Nile.

An ethnic group creates and develops its law in the same manner as it grows. "The unchanging soul of the race weaves its own destiny," wrote Lebon. There is no world-law; there is only race-law. *The absolute internationalization of law is a phantasy.* We can no more create a single law upon the earth than a single language. At best we may by agreement construct an artificiality, — a juridical volapuk.

Among races, properly so called, the law differs, sometimes in important institutions, sometimes in details. We then have a difference of physiognomy. To appreciate properly the truth of this statement, we must not limit our examination to juridical

combinations of almost inevitable similarity, such as sale or exchange, but consider, for example, marriage, property, inheritance, and also penal, public, and administrative law. When peoples were originating, in the law of their savage state, differences appeared less sensible, racial traits were less marked or less salient than in the periods of expansion where everything has emerged into clearly modeled relief.

The resemblances between laws are derived from the action of factors other than racial, and from our common human foundation. Moreover, the "structure" of juridical action is as unalterable as that of mathematics.

§ 4. **Historical and National Races.** — In its common application we use the word "race" in a restricted sense to designate "peoples" which have undoubtedly the same origin, but to which accidental events have given superficial and graduated differences. Thus Latins, Germans, and Slavs are all Aryans. However, we say, commonly, the Slavic race, the Germanic race, and the Latin race, constructing thereon a thousand eulogistic or discrediting fancies. Chauvinism has no other basis. And yet these are flowers of the same kind, distinguishable only by the colors of their petals, like carnations, growing in the same flower garden. We should say the Latin variety, the Slavic variety, or the Germanic variety of the Aryan race; or similarly the Jewish variety of the Semitic race. "Res facta, non nata!"

If it is intended to express the existence among these groups of certain differences which have become fixed in the course of time by reason of dissimilarity of environment, by reason of upheavals, events, and governments, there is no objection. Peoples are the products of history; races are the products of nature. But it must be admitted that the word "race" is unfortunately employed to designate a "simple variety" of a single ethnic group. The Arabs, the Chinese, the negroes, are not mistaken; for them, all others are whites; "Roumi" or "Nazrani" form but a single unit.

§ 5. **Racial Uniformity is Conceivable.** — Among peoples who are, with regard to one another, merely "varieties", for example the Europeo-Americans, antipathies exist at present, of course. And they are frequently violent, — even in spite of identity of civilization, as attested by dress, brotherhood of language both as to root and syntax, by form of government, military organization, transportation, postal and telegraph service, by their agricultural methods, dwellings, food, drink, forms of worship, recreations,

arts, literature, press—everything, yes, nearly everything! But the differences in their law are slight; they would seem to be only temporary, manifesting a characteristic movement towards “juridical unity”, except for the inevitable persistence of minor differences and of the mode of expression fitted to the genius of the languages. And this would seem but a return towards the uniformity embracing them during the period of their primitive law, which patient and interesting research shows to have been almost identical, in spite of enormous geographical distances separating them. Thus, for instance, the old Irish “Brehon” or law is found again in the law of the Ossetes of the Caucasus Mountains.

Especially with regard to those juridical problems of contemporary society not hemmed about by tradition and race (for example, everything pertaining to certain forms of incorporeal property — patents of invention, artistic and literary copyright, and trademarks) the tendency towards unification is notable. Not only the general mechanism of these legal institutions is the same, but even details are reproduced. Conferences meet frequently to bring about uniformity in those matters where international relations are most frequent, among others in maritime law. The great Codes may differ in expression, but their fundamental ideas offer striking analogies. We feel that in the profoundest depths of their consciousness, these peoples, springing from the same root, have been under the force of a race psychology, common and invincible.

CHAPTER XIV (CONTINUED)

II. A WORLD COMMON LAW AS NEEDFUL AND FEASIBLE
WITHIN LIMITED FIELDSBY OTTFRIED NIPPOLD¹

It is not necessary here to expound at length the arguments for the desirability of uniform laws in the field of international private law. That there are those who oppose it on principle, cannot be denied. But no one who is a friend of international law and of progress in international intercourse, or is convinced of the constantly growing solidarity of international intercourse, can dispute the desirability, at least, of international uniformity in certain parts of the law. Nor would he fail to insist that in many respects such unification is not merely desirable but is positively demanded by existing conditions.

And the really weighty objections are directed not so much against the desirability of the assimilation of the law as against its practicability. The objectors are not enemies of uniformity, but rather sceptics. They admit that uniformity in this or that branch of law would be excellent, but they doubt whether it can ever be obtained in practice. So far as the objections raised against the uniformity of laws upon such grounds require to be confuted, such confutation can be made in the most practical manner by showing that for many branches of private law unification has already taken place, or at least is about to take place. If this can be proven, all objections to the general principle of international uniformity of laws fall to the ground. After that it would remain only to remove what obstacles actually exist in regard to the various particular subjects that will be in question.

¹ [Professor of International and Comparative Law, of the Law of Carriers, and of German Civil Law, at the University of Berne; formerly lecturer at the University of Jena.]

This essay was published in the "*Zeitschrift für Internationales Privat- und Strafrecht*", 1894, Vol. IV. The outbreak of war prevented the author from revising and annotating it for the present publication, as he had intended.

Certain portions, which cover in historical summary the course of development traced in the foregoing chapters, have here been omitted. — Ed.]

For instance: Against unification of the law of negotiable instruments the absence of a precedent was objected.¹ It was said that it was an unheard-of novelty to make international treaties between sovereign countries on matters belonging to their internal laws. This argument is met triumphantly by what has actually occurred in practice; nor even during the last few years only. International treaties containing provisions on private law are by no means something new; they can be found as far back as classical antiquity.² Moreover, it is a fact that not only are there many rules relating to private law contained in Oriental capitulations, modern treaties of commerce and navigation, treaties regarding the marriage of aliens, the execution of judgments, and many other subjects; but that there are even treaties dealing exclusively with matters of private law, or of legislation regarding private law. Consequently we are justified in asking whether such joint treatment of matters of private law by several countries does not lead to international uniformity of law up to a certain degree.

Such proofs of the practicability of international agreements regarding private law, drawn from international intercourse itself, surely ought to silence objections against the principle, and to justify many of the wishes and hopes of the friends of uniformity. This, however, is true only if those friends refrain from exaggerations, if they do not dream of a Utopian law, covering the whole world, but concentrate all their efforts upon the unification of those subjects that are really fit for it.³

It is easy to determine "a priori" what subject-matters are most fit for unification and therefore most likely to become the objects of international regulation. Generally speaking there is no need, and consequently no likelihood, of unification in those branches of law which are exclusively or preponderatingly national. Other branches, however, deal with relations that are altogether, or at least in their higher stages of development, the result of intercourse among nations. In the field, therefore, of that "law of intercourse" which is in its very nature international, we shall have most reason to expect that international agreements and uniform rules may be found.

¹ Cf. Cohn, "Die Anfänge eines Weltverkehrsrechts", in "Drei rechtswissenschaftliche Vorträge", p. 109 [translated as Chapter X of this Volume. — Ed.].

² Cf. Cohn, *loc. cit.*, 110; also his "Beiträge zur Lehre vom einheitlichen Wechselrecht", p. 31, and the works there cited.

³ Cf., *inter alia*: Meili, "Die neuen Aufgaben der modernen Jurisprudenz", p. 18.

As a matter of fact this is just what we do find. In the fields usually covered by civil codes, there is no very urgent need for uniformity,¹ and we should look in vain for unifying international rules.

The only exception is in the rules for settling the so-called *conflict of laws* (or private international law), where there is a really urgent need of uniform provisions.² Now, is there uniformity in this field? Is there perhaps uniformity on some particular subjects? Or is there, at least, reason to expect unification within a more or less distant future?

There is no lack of separate treaties between various countries regulating cases of conflict for particular subjects, such as the laws of succession. But there is as yet no general convention dealing with private international law. There have been, however, numerous preliminary labors looking towards such a convention. Not only are there a number of private proposals for "codifying private international law";³ but the various governments also have already made attempts at unifying either the whole subject or particular portions thereof. There are draft-treaties of several South American countries in 1878 and again in 1889.⁴ On particular subjects, there are the international conferences which met at the Hague in 1893, 1894, [1900, and 1904]. These dealt specifically with the law of marriage, of guardianship, forms of legal instruments, succession, bankruptcy, and methods of procedure, such as the retaining of counsel, service of papers, filing of petitions, suing "in formâ pauperis", security for costs and arrest on civil process. A number of the most important problems in private international law have thus been put in the way of ultimate uniform solution.

In view of these preliminary labors undertaken by the governments themselves, it would not seem to be excessively hopeful if one were to expect in future a joint regulation of this and other subjects of private international law, and perhaps even to anticipate that this entire province of law is on the way towards inter-

¹ To what extent the exigencies of traffic require uniformity, see, among others, in *Zitelmann*, "Die Möglichkeit eines Weltrechts", p. 21.

² Cf. *Niemeyer*, "Das in Deutschland geltende internationale Privatrecht", p. 9.

³ I may mention *Mommsen*, in: "Civilistisches Archiv", 61, p. 197 *et seq.*; *A. de Donim-Petrusherecz*, "Précis d'un code international." Cf. recently: *Niemeyer*, "Vorschläge und Materialien zur Kodifikation des internationalen Privatrechts."

⁴ Printed in *Meili*, "Kodifikation des internationalen Civil- und Handelsrechts", 91 *et seq.* Cf. also *Heck*, in "Zeitschrift für Internationales Privat- und Strafrecht", Vol. 1, pp. 324, 477, 592 *et seq.*

national uniformity. By the fulfillment of this hope, a want that has long been felt, especially in daily practice, would be satisfied. We are not aiming too high if we take as a goal the international regulation of all matters involving the conflict of laws.

While in this field the need of an equalization of differences, and of general uniformity, is particularly urgent for practical purposes, yet the same need is to be found in hardly less degree in other branches of law. No doubt a need exists that cannot be much longer neglected, for assimilation of the law in all those matters that can fairly be classed as "law of intercourse" in the widest sense, *i.e.* wherever either international institutions exist or common substantial interests of civilized nations can be traced.¹ In many such cases, unification is not merely desirable, but on some points is absolutely a matter of necessity.² But if we ask whether actual conditions respond to this need, or whether there is at least a prospect thereof in the future, we shall see that the first question cannot in most respects be answered in the affirmative, but that there should be a decidedly affirmative answer to the second. In a word, we are in the very midst of development; and it would be wrong to overlook the considerable beginnings of an international law of intercourse because the final goal is still lying at so great a distance. To abandon hope that the goal will some day be reached would be an excess of scepticism.

Looking first at *commercial law* in the narrower sense, we find that in some respects uniformity of law is no longer in the preparatory stage but has become an accomplished fact. Originally, the goal had been placed too high by planning for uniform regulation of the entire field. Of private proposals of this sort I may mention that of the Englishman, Leone Levi. It may be questionable, of course, whether such a task could ever be accomplished, or whether there is a demand for its accomplishment. At any rate, there can be no thought for the present of a general treaty covering the entire field. Instead, however, we can find several attempts at satisfying the need for assimilating differences in particular subjects of commercial law, and in some instances there has been some success in gaining positive results.

The Congress of Antwerp in 1885, followed by that of Brussels, in 1888, will always remain an important milestone in the history of the movement for uniformity. The labors of these meetings were especially in the fields of the law of negotiable instruments

¹ Meili, "Die internationalen Unionen", p. 76.

² Cf. Zitelmann, *loc. cit.*

and maritime law. It is merely a question of time when a general international treaty will be made in this field.

Among other subjects upon which general conventions have been concluded, all of them involving a more or less complete unification of the law regarding the subjects they deal with, must be noted that of *copyright*. This is dealt with by the Berne Convention of September 8, 1886, creating a union for the protection of works of literature and art.¹ The central idea of the Berne Convention is that all citizens of the countries belonging to the Union are to be on an equal footing with the citizens of all the other countries that are members, so far as the laws of each country for protection of copyright go.² The principal significance of this is that each country gives protection against infringement of copyright to the citizens of all other member countries, but only according to its own national laws. As all authors belonging to other member countries must be treated in the same way as natives, the internal legislation of each country is not touched at all. In other words, this union is very far from creating a uniform law throughout its jurisdiction. At the first diplomatic conference, in 1884, the representative of the German government made a motion to work for the adoption of a code in which all provisions relating to the protection of copyright were to be collected and to be made obligatory, by treaty, on all members of the Union to be founded. The time, however, for a uniform regulation of the whole matter by international agreement, had not yet come. Such an agreement was impossible on account of the great number of laws in the various countries and the numerous separate treaties regarding literary property, all of which were the outgrowth of more or less strongly emphasized national peculiarities. Moreover, several of these national statutes had but just been revised during the 'eighties. As a consequence, uniformity was attained only as regards comparatively few points; or, rather, there are a few provisions which must be conceded as a minimum to all member countries, even if the protection given to home authors does not extend so far, *e.g.* Section 4, giving a definition of the term "works of literature and art", and thus delimiting the rights to be protected internationally.

Another branch of law already enjoying regulation by a general treaty is that of *patents, trade-marks*, and allied subjects. The convention of March 20, 1883,³ deals with firm-names, trade-

¹ Printed in "Reichsgesetzblatt", 1887, p. 493.

² Cf. § 2 of the Berne Convention.

³ Printed in *Meili*, "Die schweizerische Gesetzgebung über den Schutz der Erfindungen, Marken, Muster und Modelle", p. 81.

marks, patterns, models, and patents. This treaty is of no less significance for the question we are considering than the convention for the protection of copyrights. Here also we cannot yet speak of a unification of the law governing the whole subject, but uniformity has been obtained on certain points. Again, the principal importance lies in the fact that rights of this kind will be recognized as such and protected throughout the whole extent of the union. This is an immense step forward, and this advantage is increased by the fact that the meaning of some of these rights has been considerably extended by the convention. With all this, it is still a long way towards the creation of an international law regarding these matters. As long as the diversities of national laws remain as great as they now are, such a thing is not to be thought of. Yet we may rejoice at what has already been gained. It is something to find that every foreigner, in all the countries belonging to the Union, is treated in the same manner as a native in the protection of patents; or to be assured that every trade-mark, if it is sufficient under domestic law, is protected in all member countries; or to see that priority of foreign trade-marks is either recognized outright, or at least for three or four months until proper legal steps can be taken to acquire protection under domestic law.¹

By the side, however, of these results, significant as they are from the standpoint of international private law, there is no lack of divergences in the law of patents, patterns, and trade-marks. This is in part the reason why the German Empire has not, until now, become a party to the Union. It is precisely these existing difficulties which point to the need for further equalization or unification such as each successive conference is striving for. The existence of an international union is a guarantee for the final success of these endeavors. The fact that there is already some international protection in these matters itself creates a tendency towards unification. Meili² was entirely right in saying that the prospect of the future growth of law in this regard was bound up with the fate of the international unions, and that the only way in which these unions could further develop was to raise the international rules finally to the rank of domestic principle, in the slow progress peculiar to historical movements. This, he says, will

¹ §§ 6 and 4 of the Convention. Cf. *Simon*, "Die internationale Eintragung von Fabrik und Handelsmarken", in "Zeitschrift für gewerblichen Rechtsschutz"; also *Field*, in "Zeitschrift für Internationales Privat- und Strafrecht", Vol. 4, Heft 6, p. 562.

² *Meili*, "Die Internationalen Unionen", p. 73.

happen because conflicts will be unavoidable between the international rules and domestic statutes, and because a double rule, one for international relations and one for domestic dealings, will in the long run be impossible for citizens of the same country. That is why the endeavors towards unification are sure to be successful. Unification will progress in the course of time as regards industrial intellectual property just as it has done regarding copyright. We or our children will some day see in force an international trade-mark law as well as an international patent law.

In addition to these unions dealing with what is known as intellectual property, there are also conventions regarding the means of international intercourse, which must be mentioned here as relating to private international law.

The oldest of these is the international *Telegraph* treaty of July 10, 1875, as revised at Berlin in 1885. On that occasion the law of the telephone was also considered. This convention did great things as regards technique and organization of the telegraph business, but there are few points of private law to be found in it. Among the latter, however, is Section 1, which makes it an international (as it has been made a domestic) principle of the law of common carriers, that the telegraph office must accept business from all applicants.

The next treaty to be mentioned here goes considerably further — the international *Postal* convention of July 1, 1878, as revised at Lisbon in the year 1885.¹ This convention contains a larger number of private law rules, involving uniformity in the subjects on which they touch. Thus, the convention regulates the liability of the postal administration towards the public,² by recognizing (in Section 6*b*) such liability, restricting it, however, to registered letters.³ The convention also defines the rights of the sender by providing (in Section 5*b*) that the person mailing a letter may reclaim it or change its address as long as it has not yet been delivered to the addressee.⁴

Then follows the International *Railway* Union. This notable convention, which has the greatest importance among all these forward steps in international agreement, is distinctly different from the unions heretofore mentioned. For while the international

¹ "Reichsgesetzblatt", 1879, p. 83; and 1886, p. 82.

² Cf. *Meili*, "Die Unionen", p. 24.

³ This implies that no international liability is recognized in the case of unregistered letters.

⁴ However, in this respect uniformity is limited; a number of the parties to the treaty are excepted from this provision, according to § 5.

telegraph and postal treaties contain mostly provisions regarding tariffs and technical matters, the international railway agreement of October, 1890,¹ creates a completely uniform law regarding railway freights for all Europe. By equalizing national differences, by following the best examples set by various countries, and by complying with the requirements of modern traffic, it has been possible to create a European railway code, and thus to subject one of the most important branches of intercourse between the civilized countries of Europe to uniform rules.² With this splendid goal attained, it would be superfluous to argue further as to the need and the practicability of uniformity in this subject.³ The field covered by the convention is very strictly circumscribed, but within these limits the law of railways is almost exhaustively treated. Nearly every important question regarding international transportation of merchandise is clearly and uniformly treated by rules that take precedence over all inconsistent agreements between railways themselves. Actual uniform and international rules are established. This treaty is in effect a complete code of international railway freight law. We have a right, therefore, to call this subject the most advanced part of international law. We have a uniform, world-wide (or at least Europe-wide) railway law fixed by treaty; and this is indeed the most advanced step of which the movement towards international uniformity of law can as yet boast.

However, the international legal uniformity thus realized has a still greater significance. If, starting from this fact, we try to discern the future, and at the same time keep our eyes on the international movement in other parts of the field, there is revealed to us (remote though it be) a goal that could not appear more attractive to any friend of international law who keeps his ideals high while remembering the demands of common-sense. For these unions we have described have a tendency to grow. Their further development (as we have already indicated) will be in the direction both of greater local extension and of closer approximation of the various national laws in effect within their membership. Presumably this tendency will first become conspicuous in the case of railway law, which already enjoys a complete international code. The existing dualism of internal and external law will disappear in

¹ Printed in "Reichsgesetzblatt", 1892, p. 793; also in "Zeitschrift für Internationales Privat- und Strafrecht", Vol. 3, p. 200.

² Cf. *Rosenthal*, in preface to "Internationales Eisenbahnfrachtrecht."

³ The history of the origin of the Union is told in numerous works. I may mention those by *Cohn*, *Meili*, and *Rosenthal*, already cited.

time; for, as has been said by Meili, "a considerable incongruity between domestic and international provisions will not be tolerated permanently, especially where the foreigner is placed in a better position than the native. It is a natural necessity that a complete international code like this must tend to become the domestic railway law of all the countries in the Union."

It is already apparent that these words of his describe the situation correctly. A number of the various countries have already abolished the dual system, and now apply the law governing foreign traffic to the domestic commerce also. In this way at least a partial equalization of international and domestic railway freight law has already become an accomplished fact. Instances of this are the Russian railway law of 1885, the Italian law of 1885, the Belgian law of 1891, and the Swiss law of 1893. The law of Netherlands and of Luxemburg also is uniform with the rules of the international treaty. France is engaged now in bringing about such uniformity. Germany and Austria have revised their traffic rules, and, in 1892, accepted most of the international rules for their domestic freight traffic also. There is a prospect also that the Balkan States will revise their traffic regulations in accordance with the principles of the international treaty. Thus a uniform law does, as a matter of fact, regulate the internal as well as international railway freight contracts of most of the European states.

In other directions, likewise, the development of the railway union is likely to proceed, not only by the accession of additional countries, but by extension as regards the subject matters of agreement. Uniform rules for passenger traffic and baggage transportation are likely to be made. The preliminary work for this has already been done, so that there is the best prospect for uniform international regulation of these portions of railway law also.

However, the tendency towards further growth is not confined to the railway union. We have observed the same thing as regards the unions for intellectual property, literary, artistic and industrial. Here the same process is likely to go forward, and the hope of complete international unification is not preposterous. In view of the general tendency towards unification in all the fields where international unions exist, we should give emphatic welcome to the existence of such unions if for no reason but because they are a guarantee of the future realization of a partial international uniformity of law.

Who would say that we are already at the end of this stage of the growth of law, and that the rise of further unions covering other branches of the "law of intercourse" is improbable? And who would deny to the various labors having for their object the unification of the "law of intercourse" the probability of future accomplishment of their aim? Modern international life proves the contrary. We have met with tendencies towards uniformity in the law of negotiable instruments in maritime law, and in many branches of commercial law, such as guarantee that in other matters also uniformity will some day be accomplished. It is quite likely that in the course of time the various countries will by treaty increase the number of legal subjects uniformly regulated internationally. For all these subjects have an international coloring as branches of the "law of intercourse."

One must not, of course, indulge in illusions regarding the time required for such assimilation of law. However, if we admit that there is some prospect of attaining the goal that now is still far distant, when all the subjects mentioned shall be uniformly and internationally regulated, may we not in the interval apply the lofty name of international law of intercourse, or "world law of intercourse" to those portions of the edifice which are already visible?

At the beginning of this essay, I announced myself as opposed to any excessively vague or general idea of world law, or world-wide private law. This idea is too general, because it is liable to the suspicion of aiming to unify into a dead level of sameness even those parts of the law which are naturally repugnant thereto and should preserve their national coloring. We should always bear in mind that assimilation has certain natural limits. No less, however, should we remember that there is a natural tendency towards assimilation wherever we deal with the law of that intercourse which is by nature international, and that this tendency is actually irresistible wherever the economic interests of world commerce require international and uniform regulation. For this reason, provided the aim be confined to those subjects illustrated by the inventory just taken, we consider uniformity of law not merely desirable but practicable. If we take account of a reasonably large period of time, it is even already in sight. If we remain within the bounds of our inventory, it is by no means fanciful to speak of an international law of intercourse as already perceptible and in course of development. We have been studying the actual

phenomena of international life, and it is they that have encouraged our vision into the future.¹

And the conviction is bound to spread, more and more generally, that the creations of modern international life with which we have dealt are the promising beginnings of a world-wide law of intercourse. This is proven by the endeavors and labors of many governments and associations, and no less by the interest shown in these subjects by modern legal science.²

In closing I should like to emphasize another matter which may also throw some light on the significance of the nascent uniformity of international private law. The work to which scholars and governments devote themselves so zealously is and must be a work of infinite detail, no matter how grand the final object may be. Some may doubt, therefore, whether such labor is worth while. Yet even for the present age its importance is far-reaching. For if it is to create a possession common to all, the steps thereto must also be taken in common. To labor for the creation of an international law of intercourse is a common task in which scholars and statesmen of various nations join hands, and in the course of which many differences are bridged over, much knowledge is gained, many prejudices are overcome. Such continuous labor in joint endeavor not only promotes the growth of international law, but also strengthens the sense of solidarity of the interests of the various nations. Thus the arduous detailed labor necessary for attaining the great goal of a uniform law of intercourse is at the same time not to be underestimated as an instrument in the interest of world peace.

¹ Incidentally it may be said, however, that conditions at the universities are in accord with this but little or not at all. Unfortunately, the law schools are none too friendly to international law, and the universities are partly at fault if this phase of modern legal life is not always considered as seriously as it may rightfully claim. See *Meili*, "Unionen", p. 77.

² Meili especially calls attention to this again and again in his works, and very properly so. *Cf.*, e.g., "Unionen", pp. 57 *et seq.*

CHAPTER XIV (CONTINUED)

III. THE INTERNATIONAL ASSIMILATION OF LAW:
ITS NEEDS AND POSSIBILITIES FROM AN AMERICAN
STANDPOINT¹BY JOHN H. WIGMORE²

A notable feature of contemporary international life is the movement for the assimilation or unification of private law and procedure among nations. The present tremendous conflict of arms has only suspended temporarily this movement; for its causes and agencies are permanent, and will soon again resume their action.

This movement can be traced back definitely for more than two generations. It first became a conscious aspiration of eminent leaders at the time of the earliest International Expositions, in the 1850s, at London and at Paris. It now possesses a considerable history, and the literature discussing the movement has grown to some size.³ The scope of subjects in which assimilation is potentially feasible has been examined in the foregoing essays. The various methods of effecting it have been noted, and the varying success of the measures already adopted, as well as the causes for the movement and the need for its acceleration and extension.

At one extreme stand enthusiasts, like Leone Levi, of England, and Ivan Perich, of Serbia, who believe in its unlimited possibilities and desirability. At the other extreme are skeptics like Picard, of Belgium, who do not believe in its intrinsic desirability as a general aim. In the middle stand some cautious practical observers, like Nippold of Switzerland, Baldwin of the United States, and Ripert of France, who sympathize with the efforts made and making, but realize that such a movement must rest on a solid basis of harmonized custom, that it cannot advance faster than the need for it, and that it involves practical difficulties which can be

¹ [An Address delivered before the Second Pan-American Scientific Congress, at Washington, January 4, 1916; first printed in the "Illinois Law Review", X, 385 (1916). — Ed.]

² [Dean of the Faculty of Law, Northwestern University, Chicago; Chairman of the Editorial Committee for this Series; Illinois State Commissioner for Uniformity of Legislation. — Ed.]

³ To the foregoing essays should be added those cited in the Editorial Preface to this volume.

effectually surmounted only after elaborate detailed studies and repeated conferences of experts and national representatives.

The time has now fairly come for America to realize that there is such a marked and general movement, progressing on a large scale, and that it must be studied as a whole. And yet no writer hitherto appears to have considered it, as a whole, in its possibilities and needs for the future, from an American standpoint. It is the purpose of the present essay to consider it from that standpoint.

The subject will be treated under three main heads :

What is in general the need or the utility of an international assimilation or unification of law ?

What are the methods by which experience shows that it may be achieved ?

What is the part to be played in this movement by the United States of America ?

Reflecting on the history of the movement for unification of law as it has grown during the last two generations and more, analyzing its revelations of success and of failure, and estimating its lessons in the light of the needs and the tendencies of the times, the following conclusions may be ventured :

1. International unification of law, as an end in itself, is not desirable.

International unification of law, or concert in modes of justice, is desirable, so far as it is a means for removing inconveniences and other obstacles actually experienced in commerce and general intercourse and due to divergencies of national law or to abuses not reachable without international concert.

2. The methods of unification and of concert must vary, according to what is most feasible in each separate part of the field.

3. The federal organization of the United States is both useful and detrimental in this enterprise ; useful, in that its internal operation presents valuable analogies for world legislation ; and detrimental, in that its external operation renders this nation as yet incapable of doing its just share to advance the good cause.

These conclusions will now be briefly explained.

1. *International unification of law, as an end in itself, is not desirable.* For it flies in the face of that perpetual biological truth, the differentiation of species. It aims to suppress that variety of life which intrinsically must express itself in a rich and healthy variety of custom and law. Life without liberty is valueless, and liberty signifies individuality and originality, for nations as for men. The eloquent exposition of this truth by the distinguished Belgian

jurists,¹ leaves nothing to be added. A general unification of law "could signify nothing more than artificiality, despotism, and fragility."

The world is to-day witnessing the close of a brutal, bloody, and needless struggle, due to the conceited ambition of one people to impose its own standards upon other peoples — a childish, crude conceit in the superiority of its own "culture", and a ruthless ambition to force others to conform. Each nation has and always will have, its own conceit; there is a self-conceit of London, of Paris, of Madrid, of New York, and of the peoples of those countries. But hitherto that conceit has been satisfied by each country keeping to its own ways, in proud and harmless self-satisfaction. We have now witnessed for the first time the effects of an aggressive conceit, which reaches out to impose its own standards on others. And the world does not and will not endure this kind of conceit, nor this kind of unification. Live and let live, is the beneficent law of life.

A true unification must come by abnegation, not by imposition. The history of the successful parts of this movement shows that harmony has been reached only when each nation gave up some part of its own cherished customs, as a contribution necessary to final harmony.

Such a sacrifice is demandable only for the sake of overcoming some common danger or inconvenience. It is not demandable for the sake of unification alone — which is a mere abstraction, profitable to no one. Thus, plainly, a unification, for the sake of unification in itself, can only be the repulsive one resulting from the coercive imposition of one nation's standards upon others. And the only sound and desirable unification is that which arises from the voluntary co-operation of nations, large and small, each sacrificing some valued customs of its own, for the sake of avoiding some disadvantage and thus of enhancing the common welfare.

This enables us to shape an acceptable proposition :

International unification of law, or concert in modes of justice, is desirable, so far as it provides a means for removing inconveniences and other obstacles, actually experienced in commerce and general intercourse, and due to divergencies of national law or to abuses of individuals not reachable without international concert.

The history of all of the vigorous movements for uniformity illustrates this truth. In the international fields of commercial paper, of railway freight traffic, of postal service, of maritime freight

¹ Chap. XIV, part. I, *ante*.

contracts, of navigation, of trade-marks, patents, and copyrights, the inconveniences and obstacles caused by divergent laws became intolerable, and forced all parties to co-operate to avoid them. In sanitation, in the slave-trade, in the opium trade, in bankruptcy, in extradition, the abuses feasible for individuals practicing dangerous or wrongful acts in the immunity of a foreign jurisdiction created intolerable conditions, which naturally called for a concert of repressive action.

Whenever, therefore, conditions of either sort exist, international unification of law or concert in modes of justice becomes desirable.

Are there any such conditions remaining, in any fields of custom, law, or justice? Undoubtedly.

To catalogue them, here, would be needless. Many of them, indeed, are so obvious that they clamor unceasingly for attention. Our slowness in girding up for action to remedy them should give us shame. And I would not utter a word to hold back any such efforts. I would only have it understood that our true aim and guiding principle should be, not to chase the "ignis fatuus" of unification as an end in itself, but to toil assiduously for unification or concert as a necessary means to remove specific existing obstacles to convenience and safety in commerce and general intercourse.

And this brings me to my second proposition, which is the answer to the question, What are the available methods for securing this unification and concert?

2. *The methods of unification and of concert must vary, according to what is most feasible in each separate part of the field.*

Here, emphatically, history becomes our best teacher.

The methods available are four in number:

a. Uniform usage of individual parties or groups, by voluntary agreement; *b.* Uniform national law, by voluntary national legislation; *c.* Unified international law and administration; *d.* Uniform national rules for conflicts of laws.

a. Uniform usage of individual parties or groups by voluntary agreement. This method is the one most solid in its foundations; because all laws are based on interests, and represent the result of a rational struggle in which one interest dominates for the time over another (as Bagehot and Ihering long ago pointed out); and if this struggle between interests can be brought to an equilibrium by direct concord of the very representatives of those interests, the adjustment is the more likely to be satisfactory and permanent.

On the other hand, such an adjustment lacks legislative sanction, and therefore the state's coercion of an obstinate minority is

impossible; and this is likely sometimes to be fatal. But nowadays the organization of these interests themselves — the trading, the manufacturing, and the professional associations — is growing so powerful that an economic coercion is often possible, and is then as effective as a state coercion.

The only real danger in this method arises when the organized interests themselves adopt their uniform practice which is in disregard and detriment of outside interests, *i.e.*, of the public in general.

The feasibility of this method, and the extent to which it has actually come to be employed, would perhaps be surprising to those who have not studied the history of the facts. The most notable example of it is the York-Antwerp Rules for Maritime General Average, which came into use by voluntary practice in the contracts of freighters, after a generation of fruitless attempts to agree upon an international treaty.¹ To-day these rules are universally observed, without apparently having the legislative support of a single nation.

This method of unification is the one most natural to the Anglo-American principle of individual liberty and self-control. It has almost unlimited possibilities now awaiting (and demanding) its employment. What is needed is simply more self-sacrifice among the interests concerned (*i.e.*, more enlightened self-interest), and a few leaders to devote themselves to the cause.²

b. Uniform national law, by voluntary national legislation. Hitherto this has been the method most obvious and most thought of. Its successes have been great, as the history of the various fields exhibits. But its failures have also been notable.

A main reason for the failures seems to have been the intellectual gap between the international drafting bodies and the national legislative bodies. The former are usually experts in the subject, and they have had the benefit of the debates of the conferences; so that they fully appreciate the necessity of the sacrifices made for international harmony. The latter are not experts; they are not keenly alive to the necessity of compromise; they are alarmed by the "ex parte" arguments of the defeated interests; they give no hearing to the international delegates; the subject is crowded aside in their minds by the pressure of domestic legislative

¹ *Cohn, ante*, Chap. X.

² "Individual effort has done more to spread the vogue of these rules than all the reports of official commissions to their various governments", (*Bousquet*, 1906, "Commentaire pratique des Règles d'York et d'Anvers", p. 25).

problems. They proceed to sanction the international draft only when the subject is of small scope and uncontroverted in its proposals, or when the national delegates to the international conference happen to be men of political prestige who command the confidence of the respective national legislators.

Another shortcoming in this method ¹ is that a status of legislative rest is never perfectly attained at any time. Either the next international conference makes new alterations and additions, which would require new action by many legislatures before uniformity is restored; or the national courts soon begin to vary in their interpretation, and the uniformity ceases in fact to that extent.

The defects in this method are inherent. Nothing short of an international legislative body, or a series of them, each with powers over a special subject, would remove these defects.

Meanwhile, however, two expedients would contribute much to practical improvements: (1) Let the national delegation to the international conference include invariably one or more members of each of the two national legislative Houses. Thus would be assured a greater probability of the national acceptance of the international draft. This expedient has often been employed by Continental states; and its employment by the United States for the conference on Safety at Sea, in 1913, helped to the subsequent successful result in that case. (2) After an international draft has been nationally accepted in uniform legislation, let the national Supreme Courts, by delegation, form a voluntary conference for periodical meeting, to secure uniformity of interpretation. The divergences of interpretation are largely due, not to deliberate difference of conviction, but to inadvertence and to lack of a mutual understanding. This expedient has apparently never yet been employed; but it is feasible and promising.

c. Unified international law and administration. This method has, of course, thus far not been employed in theory; because it presupposes an international legislative body having inherent and continuous powers. And, hitherto, every such enterprise has been based on at least an initial legislative assent by each national legislature.

But, practically, this method is in force in a few fields in which the administrative element is the most important one for uniformity of operation. The Continental Railway Freight Union and the

¹ Pointed out above, Chap. XI, by *Ripert*, and for the United States, in its domestic experience, by *Henning*, in "Pennsylvania Law Review", IX, 471, 532 ("Is the Negotiable Instruments Law Producing Uniformity in the Law Merchant?").

International Postal Union are signal examples. And there remain other important fields in which it seems specially appropriate but has not yet been tried — for example, the criminal police, both detective and extraditorial; the time is ripe for an international criminal bureau.

The monograph of Ambassador Reinsch¹ is sufficient demonstration of the beneficent possibilities of this method.² But what I desire here to emphasize is the secret of its success, namely, the *professional expert character* of its drafting conferences and its administrators.

And this, we may be assured, is to be the most successful of the methods of the future. The national Legislatures are not composed of professional experts in these special subjects demanding international regulation. And the diplomatic representatives of the Foreign Offices are no less unqualified in those fields. Both are unfitted to frame such legislation. The professional expert, because he knows the professional details, is by his self-interest in the subject able to *judge responsibly for himself, and for others, what concessions can and ought to be made to secure international harmony*. Let the railway men be the delegates for railway matters, the postal men for postal matters, the bankers, for commercial paper, and so on. Let lawyers be joined with them, as guides, and let diplomats be kept in touch with them, to guard general interests. But let the professional expert be primarily the international legislator. *The process of growth in international legislation is to consist in the formation of successive special legislatures, created ad hoc for each special subject.*

The truth is that we are yet crouching too closely under the shadow of the tradition of the Congress of Vienna and the Congress of Paris. Those traditions are a remnant of the bygone days of the personal rule of the sovereign. They assume that all international treaty legislation must emanate from the Foreign Office and the State Department; and that their personnel is therefore to be primarily diplomatic. This is now an anachronism. The Foreign Office and the State Department should be content to retire to the rôle of a channel of communication and a record office, in these matters.³ *The true international legislators must be, and are going to be, the professional experts.*⁴

¹ *Ante*, Chap. XII.

² See also "La Vie Internationale", ed. Combes de Lestrade, Paris, 1911.

³ See the radical proposal of Mr. August Schwan, in the "Independent", for March, 1915; he would abolish all foreign offices.

⁴ A related movement, based on the same causes, viz.: the necessary

This is the lesson of the demonstrated success of the Railway Union and the Postal Union, and of the partial success of many other and more recent unification movements in various special fields. We must take this lesson to heart. It requires a break with tradition. But that break has already been implicitly made in the fields mentioned; and it requires now only to be frankly and formally acknowledged.

d. *Uniform national rules for conflict of laws.* This method is not different from the foregoing two in its machinery; for it requires either voluntary national legislation or a supranational legislation. But it differs in its subject; for the scope of its contents is not the entire mass of any one part of the substantive law, but merely the rules for solving conflicts. Hence it *does not call for permanent and entire sacrifices* of parts of the national substantive law of the subjects, but only of the law as applied in the limited number of international transactions. This minimizes the obstacles due to national legislative prejudice and to individual or group interests. Thus it materially affects the ease and success with which one or the other of the foregoing two methods may be employed.

Hitherto, its fields of success in international affairs have been those of marriage, divorce, succession, and judicial procedure. And these subjects also show us that its feasible scope will always be a small one, relatively speaking. For, of all nationals who marry or die or go to law, the number whose affairs give rise to conflicts of laws is only a minute percentage. Hence, a change of law for this class of cases does not reach national prejudices or interests consciously on a large scale. But in almost all matters of commercial law the percentage of transactions affected with an international element is so much larger, and the groups of persons affected are so well organized and so keenly alive to the protection of their traditions and their interests, that this method encounters almost or quite the same obstacles as do the foregoing two. And indeed the history of the subject shows us that it has seldom been successful, or even attempted, in the field of commercial law. The Railway

incompetence of the casual legislator in special fields, is already gaining headway in several of the United States. It asks for a *small legislative body in continuous session*, who thus become professional experts. See the following documents: *Kansas State Library, Legislative Reference Department*, Bulletin No. 1, Jan., 1914, "Legislative Systems"; *Nebraska Legislative Reference Bureau* (A. E. Sheldon, Director), Bulletin No. 4, May 15, 1914, "Reform of Legislative Procedure"; A. Lawrence Lowell, "Expert Administration in Popular Government", *Amer. Political Science Rev.*, VIII, 45, and other articles in the same volume.

Freight Union is perhaps the most notable exception to this general fact; and the International Maritime Committee and the Latin-American Congresses show other minor exceptions.

Such are the lessons of history as to method.

3. It remains to notice the share of the United States of America in the future of the movement.

I conceive that we may here see two important truths:

The federal organization of the United States is both useful and detrimental in such an enterprise; (a) useful, in that its internal operation presents valuable analogies for world-legislation; (b) detrimental, in that its external operation renders this nation incapable of doing its just share to advance the good cause.

(a) Not many persons seem here to reflect that these United States are now, and have for a generation been, in much the same status, towards each other, as the world-states are towards international legislation (particularly the European states and the Latin-American states, among themselves). The federal government, at the beginning, was given a limited number of specific fields for legislation, the individual States reserving the remainder. These limited federal powers sufficed amply for three generations, especially by judicial interpretation of the interstate commerce power. But during the last generation, the vastly increasing complexity of interstate transactions has gone far beyond the scope of federal powers of regulation. Interstate incorporation, commercial combinations, divorce, insurance, these are but a few of the well-known instances. Thus, our national impotence under the constitution is parallel to the international impotence for lack of a supranational legislature.

We have been forced, in the United States, to seek other methods of securing that national harmony of practice which seems to be desirable in many fields. One method has been that of uniform trade practice by voluntary private or group agreement. Another method has been that of uniform State law by voluntary State legislation.¹

¹ The writer has had the privilege, for eight years past, of being a member of the Illinois State Commission on Uniformity of Legislation. These several State commissions meet annually in National Conference, and the Conference's drafts are then transmitted to the several State legislatures for adoption. The achievements of the Conference during the last twenty-five years are described in the "Illinois Law Review", 1914, VIII, 518, by *Nathan William MacChesney*, Chairman of the Illinois Commission, former President of the Illinois State Bar Association. The Proceedings of the National Conference are published annually in the Proceedings of the American Bar Association.

Each of these methods has exhibited its respective shortcomings and advantages. I do not desire in this place to describe the United States' internal problems in this field; but only to emphasize the fact that the problem of uniformity of law between States, in its motives, its methods, and its results, is for the United States a problem largely analogous to that of international legislation for the world-states; and that the United States situation deserves more study than it has received from jurists in other countries.

(b) On the other hand, the federal organization of the United States, in its external relation to other world-states, offers an almost gloomy prospect for achieving any aspirations to take its honorable share in the assimilation of world-law. Of federal powers to legislate for internal affairs, the chief one germane to the purpose is the power over interstate and foreign commerce. But this power stops at each State line; it cannot legislate for intrastate commerce; hence it cannot give to a unified international code any force for intrastate commercial transactions. Over marriage, divorce and succession, there is no federal power at all; and the intolerable tangle in that field is notorious. Over judicial judgments and other procedural expedients of justice (except bankruptcy and extradition), it has no power to unify intrastate action.

In short, it is crippled against effective co-operation with other world-states, whether by the second or by the third or by the fourth of the methods above outlined. At the Hague Conference on Bills of Exchange, in 1910, the delegate of the United States¹ was obliged to announce,² as a special obstacle to its effective co-operation, that "the federal government has no authority to legislate regarding bills of exchange, whether foreign or domestic." In view of the plenipotentiary status which the United States ought to occupy in a congress of nations, this necessary avowal is almost humiliating to contemplate. For it must be made to the assembled world on almost every such occasion.

And it is no less alarming in results than disagreeable to the imagination. The only alternative method (as promised by the United States delegate at the conference above-mentioned), namely, the submission of each such international draft to the sovereign legislatures of our fifty States, is far from adequate to the need. For one thing, the prospects of securing uniform adoption by all States are speculative as to their result and huge in the efforts needed. For another thing, the time that must elapse is tediously

¹ Mr. Charles A. Conant.

² July 21 (Report of the Delegate, p. 118; cited *ante*, Chap. X).

excessive, and would again leave us for a generation behind the progress meantime made by the rest of the world. The most successful and imperative of the tasks of the American National Conference on Uniform State Legislation, the Negotiable Instruments Code, has required twenty years to secure its adoption by only three-fourths of the State legislatures. And what must be expected for international codes? For they would find even more torpid indifference or active hostility awaiting them in the turmoil of the various local legislative smithies.

What, then, is to be the destiny of the United States in this great and beneficent movement? Is it to remain apart, isolated through national impotence?

I see no prospect, ultimately, of adequate power to co-operate until there has arisen a general activity of public and professional sentiment which will support State grants of suitable authority to act. But pending the arrival of that fortunate day, what are the federal measures which could and should be advocated as the speediest and simplest to pave the way?

(I leave aside all question of amending the federal Constitution; first, because such an amendment is not practically thinkable for at least a generation to come; secondly, because such an amendment, to affect domestic (*i.e.*, intrastate) law, would virtually centralize in the federal government all legislation in the field of civil law, and would thus destroy our traditional State autonomy; and I am too firm a believer in the healthiness of local self-government to be willing to sacrifice it for any international advantages whatsoever.)

What expedients, then, remain?

Two, at least, may promise something.

(1) In the first place, in the field of *conflict of laws*, the federal government's *power to make treaties* should be employed. How far this power would be deemed by the Supreme Court to cover that subject is of course open as yet to settlement. But this need not prevent the attempt from being made. Let the federal government not hold back, in mere caution. Let it promptly, actively, and systematically undertake to become party to *all* international conventions dealing with topics of conflict of laws; and let these treaties be promulgated as "the law of the land", with the avowed purpose of superseding all rules of State law on the subject, so far as they affect international transactions. Assuming that these treaties would have this effect, this body of rules would then form a standard, to which in time we may hope that the domestic interstate rules would be gradually induced to conform. If this pro-

posal be deemed sound, the duty of our federal government would be obvious, to take a more active and encouraging part in such conferences than its traditions have hitherto permitted it to do.

(2) In the second place, and dealing with the *substantive law* itself (outside of the rules for conflict of laws), let *Congress empower the individual States to co-operate directly by treaty* in international unification. All that is needed, by way of removing legal obstacles, is the federal Congress' consent. The federal Constitution, for a century and a quarter, has read, "No State shall without the consent of Congress . . . enter into any agreement or compact with another State or with a foreign power."¹ Let *Congress*, then, *consent* that such compacts may be made. The several States may then send their own delegates to the international Conferences on commercial paper, maritime law, and the like; and these delegates may return and lay before their State legislatures the international drafts for ratification.

Theoretically, this may seem to offer little difference from the present status of such drafts. Practically, however, it ought to offer decided improvement. For in the first place, the enormous intellectual and moral obstacle of the intervening third party, the federal government, is removed from the path. The necessity disappears of convincing the State Department and of employing its machinery and perhaps that of the federal Congress. In the second place, the international delegates come back to a Legislature of their own State, with the directness and convincing enthusiasm of participants in the Conference; and they find awaiting them a local confidence and prestige which is far greater than any federal intermediary under the present system could possibly have. The prospects of their successful advocacy of the international draft would be as great as that of the delegates of other nations on returning to their home states in Europe or the other Americas.

"De facto", then, even if not "de jure", this international participation by our several States would seem likely to advance appreciably the prospects of effective co-operation by this country. And the likelihood of State willingness to co-operate is not remote. The improvement of State legislative methods is already a topic of the time.² The proposed type of delegate is already familiar to

¹ Art. I, § 10; construed in *Poole v. Fleece*, 11 Peters 185; *Rhode Island v. Massachusetts*, 12 Peters 724; *Holmes v. Jennison*, 14 Peters 571; *Virginia v. West Virginia*, 11 Wallace 39; *Virginia v. Tennessee*, 148 U. S. 503; *St. Louis & San Francisco R. Co. v. James*, 161 U. S. 545.

² See the citations in note 4, *ante*, p. 542.

most Legislatures in their State Commissions on Uniform Laws.¹ The Atlantic seaboard States would be almost certain to employ the proposed expedient at the earliest opportunity; and these models would before long be followed by the others.

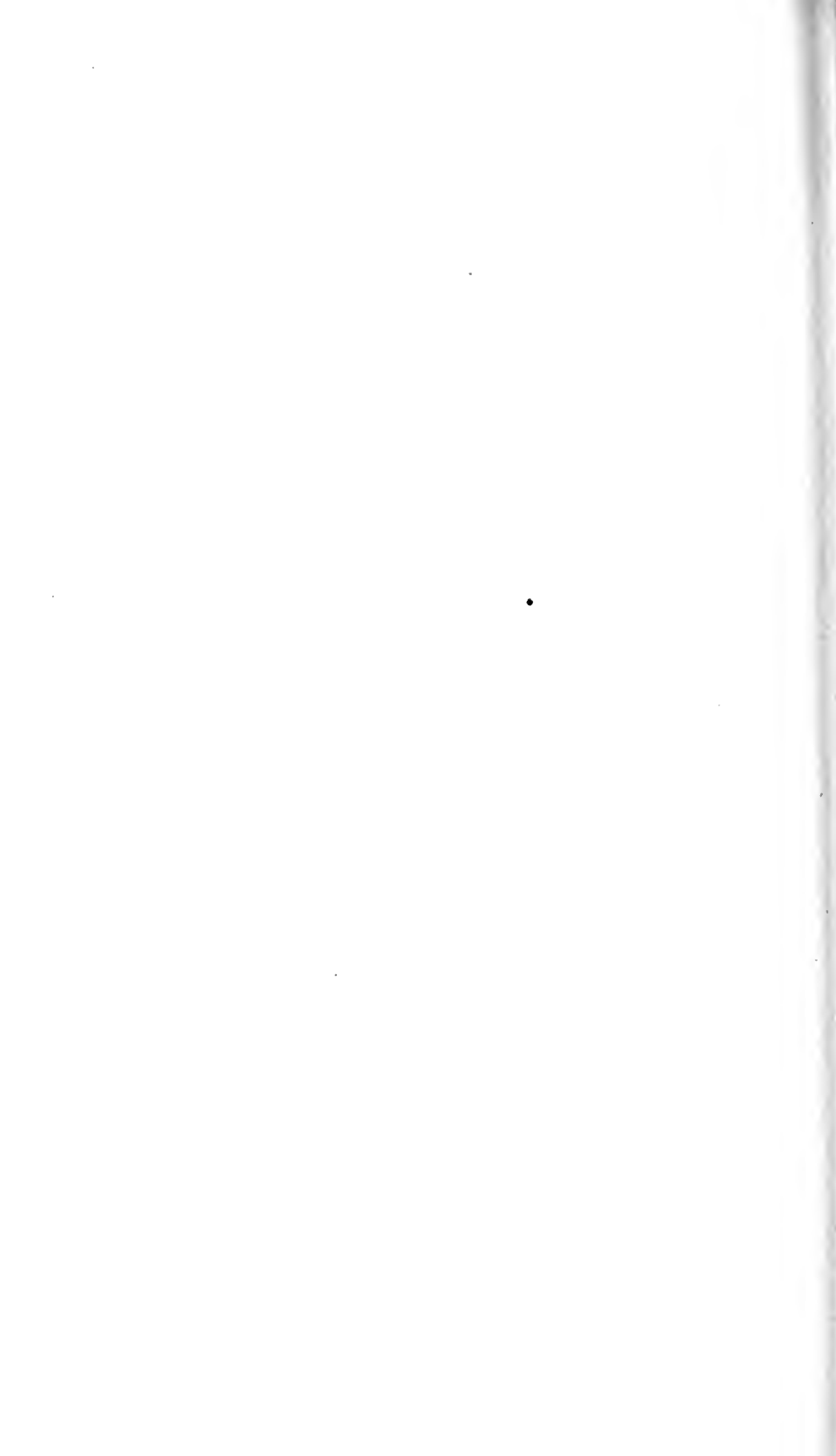
Let us therefore not give up the hope that the United States, by these proposed methods or by others, may vigorously pursue its own natural duty and destiny in co-operating with other nations for the unification of law and for concert in the administration of justice. Wherever necessity or convenience of intercourse demand such action, let us empower ourselves and highly resolve to do our share. Obstacles, indeed, there are, as none can fail to see. But history shows that they are not insurmountable. And, great as they may be, these obstacles cannot discourage us. They will but stimulate our zeal; for (to quote from words addressed to a former Conference having this lofty object at heart ²), the proverb assures us that "to conquer without hazard is to triumph without glory."

¹ See the citations in note 1, *ante*, p. 544.

² Mr. Asser, president of the International Conference on Bills of Exchange, 1910.

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